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The NATURAL LAW FORUM is dedicated to a critical examination of the significance of natural law for our times. To this end it seeks to provide a meeting ground for discussion and a clearing house for information. Scholarly contributions from the point of view of any intellectual discipline, whether scientific, historical, political, legal, philosophical, or theological, and whether favorable or unfavorable to the natural law approach, will be welcome. It follows, of course, that the views expressed in the contributions which are published in the FORUM are not necessarily those of the editors.

NATURAL LAW IN DECISIONS OF THE FEDERAL SUPREME COURT AND OF THE CONSTITUTIONAL COURTS IN GERMANY*

Heinrich Rommen

POSITIVISM WITH ITS THESIS that "law is law" has made German jurists and lawyers defenseless against laws of arbitrary or criminal content. Positivism simply holds that a law is valid because it is successfully enforced.[1] "Any legislative act is unconditionally binding upon the judge."[2] This was the position taken by one of the most respected (and most influential) commentators on the Weimar Constitution. A great majority, though in the last years a dwindling majority, of his colleagues agreed with him. They were also inclined to contend that some parts of the Bill of Rights contained in the Constitution itself — especially those which, like the Fourteenth Amendment to the United States Constitution, provided for further implementation by the legislature — were not in themselves positive rights to be protected by the courts but merely "directives" or "programs" for the legislature. Thus some commentators held that Article 109, which provides that all Germans are equal before the law, was binding only on the administration (*Verwaltung*) and the judiciary, but not on the legislature, the latter being free to protect existing special privileges and to introduce new ones. Some held that this article was no legal norm at all. One called it wholly meaningless.[3] In his widely used smaller commentary Gerhard Anschütz says that those who see in this article a rule of law and not merely a well-sounding claim are influenced by value judgments based on American and Swiss constitutional law;[4] if Triepel, for instance, speaks of "legislative absolutism" then it must be said that judicial review after the American pattern establishes simply another kind of absolutism. Needless to say, Anschütz strongly opposed any form of judicial review of the legislature.

* This study was made possible by a grant of the American Philosophical Society for which the author expresses his gratitude.

PRELIMINARY REMARK: In German, the term *"Naturrecht"* includes those rules of the broader natural law or *"natürliches Sittengesetz"* which concern human living together, i.e., the political community and its common good of which the basic human rights, for instance, are a vital part.

1. GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 352 (4th ed. by Erik Wolf, 1950).
2. GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHES 279 (1929).
3. A. VON FREYTAG-LORINGHOVEN, WEIMARER VERFASSUNG 295 (1924).
4. *Op. cit. supra,* note 2 at 305 ff.

Similarly, Article 113, concerning the protection of national minorities and their right to the use of their language in education and in administrative agencies and courts, was declared to be merely a directive for the legislature, not an immediately applicable rule for the courts. No individual rights could be derived from it, because individual rights against the legislature were unthinkable.[5] Thus there prevailed a tendency in stark opposition to American and Swiss constitutional doctrine, a tendency to see in the typical provisions of the classical Bill of Rights no limitation on the legislature.[6] Judicial review as it developed in the United States was unacceptable to most commentators. In their view, the judiciary was permitted only to decide whether laws had been correctly passed and promulgated in accordance with the rules for the legislative process; whether the substantive content conformed to such criteria as justice, liberty, reasonableness, and nonarbitrariness was excluded from judicial inquiry.

The roots of this doctrine are partly historical, partly philosophical. To the first category belongs the tradition of absolutism, which gave the King the right to intervene in any case before a court and to decide it on his own authority (*Kabinettsjustiz*), as well as the rule that the courts were not permitted to interpret independently the codes of law (which were issued frequently under the absolute monarchies) but had to have recourse to the "Legislative Commission" to ascertain the will of the legislator.[7] Under the influence of more or less rationalistic conceptions of law and of the all-comprehensive systematic code, the judge, as a civil servant wholly subordinate to the absolute king, became an automaton-like being, as Duguit said, or a "slave of the Law."[8] Under these conditions one need not wonder that the rising liberal-democratic movements thought little about the judiciary as a possible guardian of the Constitution and the Bill of Rights.

These movements, following the thinking of the French rather than of the American Revolution, put their trust in the legislature as a limitation upon the constitutional monarch. The experiments made with "constitutional courts" or *Staatsgerichtshöfe* were, even under the Weimar Republic, more concerned with the competencies of the various branches of the government or with those of federal and state government than they were with substantive values and basic human rights.

Meanwhile, from the middle of the nineteenth century on, legal positivism

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5. ANSCHÜTZ, *op. cit. supra,* note 2 at 94, 96.
6. It should not be forgotten that, from the middle of the twenties, a contrary doctrine gained some influence under Triepel, Leibholz, Nawiasky, Kaufmann.
7. FRANZ W. JERUSALEM, DIE STAATSGERICHTSBARKEIT 28 (Tübingen, 1930). A special order of the King of Bavaria forbade any commentaries on the Criminal Code of 1813. *Ibid.*
8. Paul Bokelmann, in FESTSCHRIFT FÜR RUDOLF SMEND 27 (Göttingen, 1952).

was gaining more and more primacy. Under this doctrine — branching off from general philosophical positivism — *jus* (*Recht*), especially any kind of judge-made *jus,* is pushed into the background; and *lex* — the formal law, the product of the legislative majority — gains absolute control. The judiciary is not — and does not consider itself to be — an equal of the legislature. Dr. Hermann Weinkauff, once a member of the old German Supreme Court (*Reichsgericht*) and now Chief Justice of the Federal Supreme Court, states of the former that it

> followed in its whole jurisdiction the tradition of not touching the philosophical fundamental principles of law that lay at the basis of positive law. It did not take a position here but limited itself to a reasonable application to the individual case of the positive legislative law which it accepted without critical tests. . . . Such a tradition presupposes that the positive law. . . self-evidently stays within the underlying order of justice and also that in any civic society certain fundamental principles of law and ethics are universally and indubitably though perhaps only tacitly accepted as valid.[9]

Only under such a presupposition could the *Reichsgericht* in the comparatively calm days of the middle twenties say: "The legislator is sovereign [*selbstherrlich*], not bound by any limitations except those that he has imposed upon himself in the Constitution or in other laws."[10] It was due to essentially transitory conditions that legal positivism, itself part and parcel of a general positivism in philosophy and ethics, was able to persist. The civil society of the time, in spite of a widespread relativism, still rested securely on a general consensus as to a traditionally or *de facto* accepted hierarchy of values in state and society.

It is scarcely surprising that under these partly historical, partly philosophical conditions the judiciary could not claim substantive review of the legislatures. It could not become the "guardian of the Constitution" as the Higher Law, nor would the people see in the judiciary the protector of the Bill of Rights. Though the *Reichsgericht* seems to have claimed in two decisions a

9. Chief Justice Weinkauff, a staunch defender of natural law, speaks of the *Ur-Rechtsordnung,* by which he means the natural law. Cf. his contribution on the question of resistance against tyranny: DIE VOLLMACHT DES GEWISSENS part I (Bonn, 1956); and ÜBER DAS WIDERSTANDSRECHT 13, 16 (Karlsruhe, 1956), where the UR-RECHTSORDNUNG is defined as suprapositive legal order higher than positive law, valid by itself, i.e., an order of natural law. The quotation is taken from 75 JAHRE REICHSJUSTIZGESETZE 49 ff. (Bonn, 1954).

10. 119 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereafter quoted as RGZ) 327. It should be remembered that in most continental constitutions the amending power rests with the ordinary legislatures, the only difference being that a qualified majority of a qualified quorum decides.

right to review, it is still debated among jurists whether it actually did so.[11] In any event, the *Reichsgericht* never rendered a decision comparable to *Marbury v. Madison*. Even had it done so, it could never have established a doctrine with one or two cases, since the rule of precedent is unknown in German law.

Later, the traditional consensus, more implicit than explicit, more sensed than rationally and critically evaluated, began to give way more and more under the impact of great social upheavals of the masses — anxieties caused by frustrated longings for status and security during a demoralizing economic depression. When that happened, the socio-political cohesion, the public order and peace, began to diminish also, and antagonistic class tendencies began to threaten civil war. If civil war was to be avoided, the only way out was a legal, yet revolutionary, change of the socio-political *status quo*. Whatever the underlying longings for greater social justice, for a more perfect realization of human rights, they are for the legal positivist matters of indifference; he is satisfied if the change is legal, he is less interested in the moral values, in search of their more perfect concretization. Now Hitler — who had an uncanny flair for recognizing both the indistinct longings of the masses and the respect of officers, civil servants, and jurists for legality, however lacking in substantive legitimacy — staged just such a "legal" revolution (a wit called him Adolf Legalité) and thus he disarmed intellectually all those who adhered to legal positivism. Hitler even got legally the power to create new constitutional law, first qualified by some formalities, e.g., that the cabinet or council of ministers must consent, but ultimately issuing in the rule that solely the will of the Führer promulgated in the *Reichsanzeiger* makes the law. Toward the end of the war even that formality was dropped. The judiciary, purged of all open opponents of the regime, whose seats then were taken by trustworthy adherents, had, under this paroxysm of positivism, to restrict itself — if we except civil, commercial, and the politically irrelevant parts of criminal law — to the menial task of acknowledging the legality of all acts of the Führer and his underlings. For under the rule that the Führer's will uttered with a minimum of form *is* the law, the role of the judiciary was that of an automaton. Or individual judges could defy the regime — as not a few did — and die as martyrs to their high vocation.

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11. See the elaborate discussion in RICHARD THOMA and ERNST VON HIPPEL, 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS, where Thoma argues against and von Hippel in favor of "judicial review." The cases referred to are found in 102 RGZ 164; 111 RGZ 322. Cf. the resolution of the Association of the Judges of the *Reichsgericht* of January, 1924, asking that it declare void an act contrary to the principle of good faith. Paul Bokelman, *op. cit. supra*, note 8 at 31.

II

It is understandable that under the intellectual and constitutional conditions of the Empire and the Weimar Republic — not to speak of those of the Hitler regime — the courts did not introduce considerations of natural law. The prevailing doctrines admitted neither a truly independent and equal judicial power of government nor a *"Recht"* broader than the formal law issuing from the legislature; still less did they accept a basic idea of justice and equity as superior to all positive law. It is understandable, too, that judicial review of legislation, which could have opened the way to natural law, did not find full acceptance, and that the proponents of judicial review were often, though not always, open to the theory of natural law. This does not mean that one will not find during this time traces of natural law in court decisions. The so-called general clauses, especially the references in the Civil Code to *"gute Sitten,"* or *"Treu und Glauben,"* and the necessity for judicial determination of certain socio-economic conflicts[12] opened opportunities to introduce arguments and opinions with a natural law orientation. On the whole, however, the prevailing intellectual climate of legal positivism stood in the way of an open acknowledgment of the suprapositive norms of natural law.

With the *Götterdämmerung* in May, 1945, there fell what many jurists had regarded as a "regime of systematic injustice," a regime which had taught *ad hominem* the necessity of universal higher standards of objectively valid suprapositive principles for the lawmaker. Accordingly, from the middle of 1946 on, a revival of natural law thinking took hold of the intellectual world, especially the jurists and the members of the constituent assemblies of the *Länder*. Or, more correctly, this revival began to manifest itself publicly. Naturally the "system of injustice" had produced conversions, as it were, to natural law much earlier; but the Nazi authorities would not permit an open discussion.[13] At the same time, all attempts at passive and active resistance to the regime were necessarily grounded on natural law ideas or on divine law, for legal positivism as such could offer no foundation. This has been brought out in numerous publications since the war.[14] It was a favorable circumstance, too, that Protestant theologians — not so much of course Karl

12. Cf. Fritz Baur, *Sozialer Ausgleich durch Richterspruch,* 12 JURISTENZEITUNG 193-194 (1957), who points out that economic conflicts of interest produced by the runaway inflation after World War I gave the judges an opportunity which they, of course, used to decide such conflicts *ex aequo et bono.*

13. The writer's book on natural law (first edition) was published in 1936, but the publisher was forbidden to advertise it and booksellers could not exhibit it; it had to be sold from under the counter, like pornographic literature.

14. Cf. ZELLER, GEIST DER FREIHEIT (1953) and the publications of the *Institut für Zeitgeschichte* (München).

Barth and his disciples, but those influenced by Emil Brunner's *Justice* (1943) and his earlier *Das Gebot und die Ordnungen* — had returned to natural law thinking because of the obvious substantive illegitimacy of Hitler's legality and his open paganism. Thus ended the long estrangement of Protestant theology from natural law.[15]

When, therefore, the first constituent assemblies of the *Länder* met, there was almost unanimous sentiment in favor of strengthening the judiciary, of creating a guardian of the Constitution and the Bill of Rights in the form of a Constitutional Court — i.e., of establishing judicial review formally and explicitly — and of exempting the Bill of Rights from the amending power generally vested in a qualified majority of the legislature. The leading Socialist member of the Bavarian Constituent Assembly, Dr. Wilhelm Högner, said during the discussions on the Bill of Rights: "We see these rights as a part of the natural law, which is older and stronger than the state and which will again and again successfully and forcefully assert itself against the state. They are valid as a higher law even though human folly has denied them." [16] Professor Adolf Süsterhenn, who might be considered the Father of the Rheinland-Pfalz Constitution, said that "the judges of the Constitutional Court when examining the constitutionality of a law ought to give effect not only to the Constitution but also to the natural law." [17]

Meanwhile, lower courts since 1945 were referring to natural law in their decisions. Thus, the Wiesbaden *Amtsgericht* and the Frankfurt *Landgericht* decided that laws which declared the property of Jews forfeited to the Reich (*Reichsleistungsgesetz,* 1937) were in violation of the natural law and therefore void *ab initio,* a doctrine which the Federal Supreme Court affirmed with respect to deprivation of liberty.[18] These decisions were handed down on November 13, 1945, and June 30, 1946, before the constitution of the Land Hessen was ratified on December 11, 1946.

Most of the constitutions drawn up in this intellectual climate after World War II have broken with the pattern of constitutional thinking that obtained after World War I (see above) and have incorporated direct references to natural rights or natural law. Thus the Bavarian Constitution of December 2, 1946, speaks of the natural right of parents to educate their children (Art. 126); the Württemberg-Baden Constitution says in Art. 1 that man should

15. Edgar Bodenheimer, *Significant Developments in German Legal Philosophy since 1945,* 3 THE AMERICAN JOURNAL OF COMPARATIVE LAW 379, 383 ff. (1954).
16. Quoted in CARL HEYLAND, DAS WIDERSTANDSRECHT DES VOLKES 113 (Tübingen, 1950).
17. HEYLAND, *op. cit. supra,* note 16 at 114.
18. 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN STRAFSACHEN (hereafter quoted as BGHSt) 234. See below.

develop himself for his own weal and for that of his fellow man; and the preamble speaks of perpetual human rights. The Baden Constitution of May 22, 1947 (to be revived when and if the separation of Baden from Württemberg-Baden should be realized) speaks in the preamble of the principles of the Christian moral law according to which the state should be organized, and of inalienable sacred human rights which "are explicitly confirmed and protected by the Constitution." The Rheinland-Pfalz Constitution of May 18, 1947, speaks in Art. 1 of the natural right of man to the full development of his person within the framework of the natural moral law; it says in paragraph 3 of that article that public authority is founded on, and limited by, the demands of the common good based on natural law. In Art. 23 it speaks of the family as a community in its own natural right; in Art. 26 it refers to the natural right of the parents to determine the education of their children; and in Art. 60 it affirms that private property is a natural right, which the state guarantees. The Bremen Constitution declares in Art. 1 that the legislature, the executive, and the judiciary are bound by the laws of morality and humanity (*Menschlichkeit*).

The fundamental law (*Grundgesetz,* hereafter *GG*) of the West German Federal State of May 23, 1949, declares in Art. 1 that the German people acknowledge inviolable and inalienable human rights as the basis of every human community. It refers to these rights as "guaranteed," implying that they are not the product of the constituent power. In Art. 6 the education of children is declared to be the natural right of their parents. The rights enumerated in the Bill of Rights (Art. 1-20) are declared to be immediately valid law binding on legislature, executive, and judiciary. Art. 19 expressly states that in no case may the legislature violate the essential content of a fundamental right.

Art. 79 *GG* forbids any change by amendment of the Bill of Rights. As already mentioned, this is in consonance with most of the *Länder* constitutions. Thus the Rheinland-Pfalz Constitution states that bills of amendment that concern the Preamble (this constitution furnishes a rare example of a preamble of direct and immediate juridical relevance) or the rules of Art. 1 (which are declared to be natural law) and Art. 74 (popular sovereignty, democratic and social character of state and membership in the Federal Republic) are not permitted (Art. 129, par. 2). In a similar way do the constitutions of Bavaria (Art. 75), Württemberg-Baden (Art. 85), Bremen (Art. 20), Hesse (Art. 150), and Lower Saxony (Art. 37) limit the amending power. In most cases, the Constitutional Court of the individual *Land* has the ultimate decision concerning the application of these provisions, which in effect establish within the constitution a gradated system of rules and values.

Thus the Bavarian and the Federal Constitutional Courts, as well as the Federal Supreme Court, have held that they may declare unconstitutional a lower constitutional provision which is in violation of a higher provision (see below). Indirectly, this authority is further supported by the provision contained in *GG* and most *Länder* constitutions that the general rules of international law are part of federal law, have precedence over the acts of the legislature and bind immediately the inhabitants of the Federation (Art. 25, *GG*). This rejects the older "transformation theory." It makes available to the judiciary and the Constitutional Court (which, according to Art. 100, par. 2, has the ultimate decision) an additional substantive standard with regard to the legislature, and through the European Convention on Human Rights it provides an additional confirmation of the immediately binding character of the rules of the Bill of Rights. It must be remembered that all these limitations on the amending power are necessary because the constitutions generally follow the usual continental practice of vesting the ordinary amending power in a qualified majority of the legislature.

The general revival of natural law, the universal abhorrence of the misdeeds of a regime that "made injustice a system," and this distinction of rank among the provisions of constitutions produced as a necessary consequence the explicit establishment of judicial review.[19] In more general ways also, the judicial power of government, *"en quelque façon nulle,"* as Montesquieu said, rose to full equality with the legislature and the executive, and there is already some fear that it has risen above them.[20] I do not intend to assert that the recognition of natural law by the judiciary is only possible where there exists a kind of superiority of the judiciary or a system of judicial review. What is necessary to see is that if legislative acts are the only depositories of law, and "law" is only a formal term open to any content, and if the judiciary is helplessly bound by such a concept of "law," then there is scarcely an occasion for the judiciary to appeal to natural law. Now such a concept of law is repudiated by the new constitutions, in most cases explicitly. For some declare that the judges are subject to the constitution, to the law, and to their consciences (Art. 121, Rheinland-Pfalz Constitution), or to law and right (*Recht*) (Art. 20, *GG*); *Recht* is then a broader term and contains also suprapositive

19. That this review was then reserved to special constitutional courts is again a peculiarity of continental legal thinking.

20. Cf., for instance, HANS SCHNEIDER, GERICHTSFREIE HOHEITSAKTE 28 ff. (Tübingen, 1951). Others warn of the danger of a *gouvernement des juges,* thus picking up the title of Edouard Lambert's book published in 1921, which is a most violent critique of judicial review. In 1947 Lambert warned his compatriots against the dangers of any form of judicial review to their way of life. See his L'ANCÊTRE AMERICAIN DU DROIT COMPARÉ — LA DOCTRINE DU JUGE STORY (Paris, 1947). Cf. also WERNER WEBER, WEIMARER VERFASSUNG UND BONNER GRUNDGESETZ 25 (1951).

law or natural law.[21] The quotation at the beginning of this essay from a respected commentary on the Weimar Constitution presents today an untenable doctrine.[22]

Before we present and comment on a series of decisions of the Federal Supreme Court and the Federal Constitutional Court, it should be pointed out that these courts do not have the practice of publishing the voting on opinions, or of publishing dissenting opinions, so that the individual judges stand in the background and the impersonal institution in the foreground. Only insofar as judges publish their ideas in some other way can one know which of them is an adherent of the natural law. Thus the Presidents of the respective courts, Dr. H. Weinkauff and Dr. J. Wintrich, are known by their scholarly writings as devoted adherents of the natural law, whereas Dr. Katz, a member of the Federal Constitutional Court, has uttered skeptical views, but in a noble way, about natural law. If terms other than "natural law" occur in judicial decisions, such as "suprapositive basic norms," "suprapositive demands of natural moral law," "material justice," "fundamental postulates of justice," "norms of objective ethics," "the objective order of values," "universal agreement of all civilized nations," it is clear from the context that in practically every case the courts could as well have said natural law.

III

In the following pages certain significant decisions of both the Federal Supreme Court for Civil and Criminal Laws (*Bundesgerichtshof,* hereafter *BGH*) and the Federal Constitutional Court (*BundesVerfassungsgericht,* hereafter *BVerfG*) will be discussed; a task still to be done would be to peruse the decisions of the Federal Supreme Court for Labor and Social Jurisdiction and the Federal Administrative Court. The *BGH* handles general civil and criminal cases, in which natural law questions can arise in various ways. In the case of the *BVerfG* we are less concerned with decisions concerning the relationship between the executive and the legislature or the distribution of competencies between the Federal state and the several *Länder* than with cases of "constitutional complaint," where an individual person accuses the Government in its legislative and executive functions of infringing upon inviolable and guaran-

21. Cf. HERMAN VON MANGOLDT, DAS BONNER GRUNDGESETZ (1953), especially his observations on Art. 20, on pages 131 ff., and the bibliography cited there; GERHARD BÜCKLING, DER OBJEKTIVE RECHTSBEGRIFF (1950).

22. The Nordrhein-Westfalen Constitution in its initially proposed form declared that a law was binding as long as it had been passed correctly according to the formal way of legislation; the protest was instantaneous. Ernst von Hippel declared that this presented "in principle unlimited tyranny." RHEINISCHER MERKUR, November 22, 1947.

teed rights. It is in this latter class of cases that the Court acts in its capacity as guardian of the supreme values which the Constitution either explicitly or implicitly contains,[23] among them right itself (*Recht*), an objective supreme value with suprapositive content. In taking into account these "suprapositive and suprapolitical fundamental values the court fulfills its specific function as constitutional organ." (Wintrich.)

Let us take as our first case for discussion a *BGH* decision on a civil tort.[24] The plaintiff claimed damages from a *Volkssturm* commanding officer for the illegal killing of a near relative. The defendant had not intervened to protect a citizen who, having been arrested for hiding a non-Aryan person, had allegedly tried to flee; he was shot down by the driver of the officer's car, and, lying gravely wounded, was killed by the driver without intervention of the officer. The Court said in deciding for the plaintiff that the defendant was liable for civil tort. The defendant relied on Art. 131 of the Weimar Constitution and par. 839 of the Civil Code, which make the state primarily liable for illegal or immoral (against *gute Sitten*) acts of a civil servant (*Beamter*) under color of his office.[25] But in this case the defendant is primarily and directly liable, for Art. 131 does not go so far as to protect the official under all circumstances. In this case he gravely violated his duties and revealed by his acts that the life of a political opponent was of no value to him. He thus violated in a morally objectionable way all principles of law (*Recht*) and morality; he is, therefore, directly liable.

Another case decided at the same time involved the same commanding officer. This time the victim was a young *Volkssturm* soldier who was absent without leave. The officer had himself shot the man without any form of summary trial, and had ordered the corpse to be secretly buried, imposing strict silence on the soldiers with him. In court he pleaded the defense of superior orders since the Nazi county-leader had ordered him to kill (*umlegen*) this soldier; he also appealed to the so-called *Katastrophen*-order of Hitler empowering any member of the armed forces to kill instantly any deserter, coward, or traitor. The Court found the defendant guilty of civil tort and made him liable for damages to the mother of the slain soldier.

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23. The technicalities of this "complaint" have been worked out satisfactorily. See JOSEF WINTRICH, AUFGABEN, WESEN, GRENZEN DER VERFASSUNGSGERICHTSBARKEIT, FESTSCHRIFT NAWIASKY (1953); SCHUTZ DES GRUNDRECHTS DURCH VERFASSUNGSBESCHWERDE. . . (Regensburg, 1950). Cf. also HANS HUBER, DIE VERFASSUNGSBESCHWERDE (1954).

24. 3 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (hereafter cited as BGHZ) 94 (July 12, 1951).

25. These laws are intended, the Court said, first, to give better protection to those affected by the act of the civil servant as representative of the administrative state, and, second, to free the civil servant from overscrupulosity in his official acts due to fear of personal liability.

> Every killing of a human being is illegal and a grave violation of an official's duties if it is not justified by a rule of law [*Rechtsnorm*]. The *Katastrophen*-order of Hitler ordering the execution without any form of trial cannot be considered as a rule of law. First it was not promulgated in the form of law that was then still valid (i.e., the *Reichs-Anzeiger*). The opinion of some Nazi jurists that all in some way juridically relevant acts of will of the Führer which, according to their nature might be considered as norms, should be equal to law and thus juridically binding without regard to form, is a shameful self-surrender of all members of the legal community [*Rechtsgemeinschaft*], in favor of a despot. Such a theory cannot be accepted as a "source of law" under the doctrine of the rule of law. [The Court here quotes an earlier opinion of the German Supreme Court of the British Zone (*OBZSt* 1, 321.)]

Now the Court could have settled the case on this formalist argument. But it went on significantly:

> Even if the *Katastrophen*-order had been promulgated in due form it could not have become law [*Recht*]. For the positive legislative act is intrinsically limited. It loses all obligatory power if it violates the generally recognized principles of international law or the natural law [*Naturrecht*], or if the contradiction between positive law and justice reaches such an intolerable degree that the law, as *unrichtiges Recht,* must give way to justice.[26] Even the Führer-decree of February 15, 1945, on summary trials before military courts (R.G.Bl. I, 30) accepted the legal principle that nobody may be deprived of his life without a trial before a court; this is an inalienable human right. Thus the *Katastrophen*-order is null and void; it is no rule of law; obedience to it is against the law [*Recht*]. The claim of the defendant that he could not know this and that he acted according to the order of his superior is unacceptable. He must be held to know that no legal system permits a soldier to escape responsibility for an infamous crime by relying on the order of a superior, if the latter's orders are in stark contradiction to human morality and the laws of all civilized nations, whatever differences in positive law might exist among them.

An opinion of January 29, 1952,[27] dealt with the acquittal by a lower court of members of the Gestapo who had participated in the mass arrests of Jewish citizens and their deportation to the infamous death camps of Auschwitz and Theresienstadt. These officials were found not guilty of being acces-

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26. This is taken verbatim from GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 353 (4th ed. Erik Wolf), in connection with which Radbruch says: "Positivism has, as a matter of fact, disarmed the German jurists against law of an arbitrary and criminal content." (p. 352) See also RUDOLF STAMMLER, DIE LEHRE VOM RICHTIGEN RECHT (1926); ERICH KAUFMANN, KRITIK DER NEUKANTISCHEN RECHTSPHILOSOPHIE (1921).

27. 2 BGHSt 234.

sories to unlawful deprivation of liberty (kidnapping) and to murder. The lower court had excused the defendants on subjective grounds, though it acknowledged that objectively they had been accessories to the criminal acts. Subjectively, the lower court held, it could not be assumed that the accused had certain knowledge of the murderous intentions of the principal criminals (Hitler, Göring, Himmler, Heydrich) nor that they had the consciousness of doing wrong, since they thought that their acts were in agreement with the law valid at that time; neither had they knowledge of sentence by independent courts or formal accusations of other Gestapo officers for arbitrary arrests; and although they conceded that they had an "unclear feeling that these arrests and deportations were unjust acts against these Jews, they were not aware that in their official activity they were violating a law valid at that time." The Supreme Court refused to accept these arguments and declared that their logical consequence would be that the accused could have considered anything as lawful that the Nazi State did or ordered to be done in political matters, a doctrine which in these general terms is clearly untenable.

> The liberty of a state to determine what is lawful or not within its territory may be considered as very broad, but it is not unlimited. In the consciousness of all civilized nations we find (despite all the differences of their legal systems) a common nucleus of law [*Recht*] which, according to the universal juridical convictions of all men, may not be violated by any legislative or other act of political authority. This nucleus contains certain basic norms of human actions considered as inviolable; they have been found by all civilized nations by reason of common basic moral insight [*Anschauung*] and are thus considered valid, though an individual norm of an individual state may seem to be violating them. The decree of February 28, 1933,[28] against Communist violent acts dangerous to the state could by no reasonable person be considered as an unlimited authority for the Gestapo to violate that nucleus of norms which, according to the juridical convictions of all no legislative or other authoritative act of any state may violate. It is a fundamental fault of the lower court that in its decision it did not take into consideration these limitations on arbitrariness valid everywhere and at all times.[29] That the accused should not have known these few basic norms necessary for human living together — these fundamental norms of justice related to the dignity of the human person — or that they should have misjudged the obligatory character of these norms independent of all positive acknowledgment by authority,

28. This was the infamous decree passed after the Nazi-inspired and -managed fire of the Reichstag Building, according to Art. 48 of the Weimar Constitution; it was used more against Jews, Christians, and Socialists than against Communists. Under this decree the writer was put in "protective custody" during July, 1933.

29. This is obviously an allusion to the validity of natural law: *"ubique, semper, et ab omnibus observatur."*

> and that they should have accepted instead an authoritatively directed injustice, regarding the latter as law [*Recht*] cannot be taken seriously.

One has only to consult any ancient or modern treatise on natural law in order to see that what the Court here referred to are those basic norms which for many centuries have been called natural law.

Similar ideas were expressed in the so-called Canaris case (*BGHSt* 2, 173). Admiral Canaris and other members of resistance groups were, by order of Hitler, hanged on April 5, 1945, after a farce of a summary procedure by an SS tribunal. They had not yet been declared guilty by the infamous *Volksgerichtshof* in a formal trial. An SS colonel and other officials of the SS (*RSHA*) served as accusers; the colonel was later accused as an accessory to murder. The lower court found him not guilty because, first, Canaris and his fellow prisoners had been at least formally guilty of high treason on the basis of the laws and decrees of the Nazi state then in power and, second, because at least a kind of juridical "face" had been put on the killing by the perfunctory trial before the SS tribunal. The Supreme Court rejects this opinion and states:

> It is not unjust when in times of grave necessity and danger to the state the ordinary procedural rights of accused persons are limited to a few rules, in contrast to procedures in times of peace. But if the victims were deprived of their lives in a form that was not even covered by the then valid decrees, or that violates universally binding rules of law which are valid and binding per se, independently of any positive recognition by the state, and if the accused knew this — which is to be implied since he conceded that the Hitler order to murder Canaris and the others had already been in his hands and that consequently the summary procedure served only as a kind of "legal face" — then the accused is guilty as an accessory to murder. [The death penalty imposed according to the then valid decrees on summary procedures] presupposes a bonafide procedure, not such a one as preserves only the external fiction of a procedure. It belongs to the very nature of a juridical sentence that it be passed by independent judges not bound by any orders of a superior; that it be the result of their free juridical consciences; and that it be based on a procedure which *in se* is apt to produce objective truth, to find guilt or innocence and to judge according to the measure of guilt, so that on the result of the procedure alone rests the decision which the judges have to pronounce according to their consciences.[30] A sham procedure is no such procedure, neither in name nor in substance. The rulers of the Nazi state have often, as every-

30. As already pointed out, in the Constitution of Rheinland-Pfalz of May 17, 1947, Art. 121 states that "the judges are subject only to the constitution, the law, and their consciences." Cf. Hans Peters, *Das Gewissen des Richters und das Gesetz,* in GEGENWARTSPROBLEME DES RECHTS (Neue Folge, 1950).

> one knows, issued decrees that claimed to posit law [*Recht*] or to be in agreement with law [*Recht*]. Nevertheless they lacked the nature of law because they violated these fundamental legal principles which, independent of the recognition by the State, are valid. Acts of authority which are not even intended to serve justice, which violate knowingly the principles of equality before the law, and which gravely violate the legal convictions of all civilized nations on the value and dignity of the human person, can never produce valid law; and acts of an officer of law according to such decrees are and remain unjust [*Unrecht*]. The lower court has completely misrepresented the nature of law, which is the opposite of arbitrariness, and the nature of the judicial decision.

Another illustration of this principle is furnished by the decision on the restitution of the property of Jews that was unjustly confiscated upon their forced emigration.[31] A law on citizenship in connection with the so-called Nuremberg anti-Semitic legislation of 1935 declared that German citizens of Jewish origin who lived at that time outside the country or in the future fled or emigrated would automatically lose their German citizenship and their property would be forfeited to the State. After the war many claimed the restoration of property thus illegitimately confiscated. The court recognized these claims and said:

> These laws of confiscation, though clothed in the formal rules of the legality of a law, cannot be considered as a genuine *Rechts*-norm as to content. For these laws were intended solely to deprive of their property those who were already in an illegitimate way ["*rechtswidrig*"] persecuted and thus forced to emigrate. This is an extremely grave violation of the suprapositive principle of equality before the law as well as of the suprapositive guarantee of property (Art. 153 Weimar Const.)[32] The equality principle is the foundation of any legal order [*Rechtsordnung*] and must remain inviolable also for the constituent power, because of its suprapositive rank. [This refers to the fact that Hitler and his cabinet in the Second Empowering Act had by resolution of the by then wholly nazified Parliament received the competency to change old and to establish new constitutional law. Consequently these provisions of the citizenship law] were and are by reason of their unjust content [*Unrechtsgehalt*] and their violation of the basic demands of any legal order null and void; this law

31. 16 BGHZ 350 (February 28, 1955).

32. The positivist commentators (cf. Anschütz, *op. cit. supra,* note 2 at 397 ff.) recognized that this article contained an *"Institutsgarantie,"* namely, that even the legislator could not abolish the "legal institution" of private property. But what of the qualified majority of the legislature as manifestation of the constituent power? Is this also bound by this *"Institutsgarantie"*? This question was scarcely discussed under the circumstances. Anyway, the commentators would never have spoken of a suprapositive institution.

> could not, even at and during the time of the Nazi regime, produce any *legitimate legal effect* [*Rechtswirkungen*]. [italics in the original]

The Court, in rejecting unjust acts of the Nazi government, does not fall into the opposite kind of extreme formalism that would have it that every law or decree passed by the Nazi State is *ipso facto* tainted or invalid irrespective of its content. This — the converse of the view of the positivist jurists, to whom, without regard to content, all laws that formally emanate issue from whatever form of political authority are valid — is also repudiated by the Court, which knows that, besides the form, and independent of it, the legitimacy — as distinguished from mere formal legality — of laws and decrees rests on *"materielle Gerechtigkeit,"* i.e., on the conformity of their content to the natural law. This the Court explains lucidly in a decision of February 8, 1952.[33] In principle the formal validity of legal rules depends on the constitutional norms valid at the time of their being passed.

> The particularities of the form of legislation characteristic of the *Führer*-principle do not invalidate *in se* and *per se* all the acts of this form of legislation without regard to their content. Once the dictatorship has established itself and finds external conformity, then legal norms enacted according to the specific nature of dictatorship cannot be considered as *in se* invalid. The new form of government, even though it came into existence under breach of previous constitutional law, must be considered as legal. That is in accordance with natural law. Though the mere fact of usurpation of political power cannot *ex se* produce subsequently (by the mere fact of external conformity of the citizens) its legitimacy, the legally relevant fact of the establishment of the new constitution and its actual care for the common good may serve as a subsequently developing legitimacy. [The Court refers explicity to Johannes Messner, *Das Naturrecht,* second edition, 1950, page 496.][34] Hitler and his party gained full power, acquiescence and aid from the people and international recognition (cf. Judgment of Military Tribunal Nr. III, U.S.A., Nuremberg 3-4 December 1947). When Hitler later abused this unlimited plenitude of power through oppression and criminal acts, there was ground for a denial of legal recognition to these unjust acts; these may have been just cause for active resistance and overthrow of the regime; but this cannot change the fact that the Hitler regime, as long as it was in power, was *legally competent to* posit legally valid laws and decrees. This does not mean that all of them were — in the true meaning of the word — "Recht" if and insofar as in their *content* they violated the commands of natural law or the universally valid moral laws of Christian Western civilization.[35]

33. 5 BGHZ 76.
34. An English edition under the title SOCIAL ETHICS (B. Herder Book Company, 1951).
35. Italics in the original.

Thus, in a lawsuit involving the claim of a civil servant to a pension, it was held that service under the absolute monarchy, the Weimar Republic, and the Nazi regime could all be counted in the establishment of such a right, so long as the particular claimant had not lent himself to unjust acts of the regime.[36]

In a decision of November 16, 1953, not involving Nazi legislation, we find also arguments from substantive equity and from distributive justice.[37] Plaintiff asked for indemnification for a radio requisitioned by the mayor of X by order of an American officer, to be turned over to a victim of a concentration camp. It was stolen from the latter, and the original owner sued the mayor for the value. The owner won his case, but before he received payment the currency reform took place, which created a new mark and ordered that money claims, with certain enumerated exceptions such as wages, pensions, and rents under a lease, should be paid in the ratio of one mark new currency for ten marks old currency. The question was whether the owner should receive compensation according to this ratio. The two senates in civil law disagreed; so the decision went to the so-called Great Senate, i.e., both senates sitting and deliberating together. The decision went in favor of a ratio of 1:1 because expropriation is an invasion of private property of such a character that the resulting claim to compensation cannot justly be treated as a mere money claim. The court said:

> Expropriation is essentially a breach of the general guarantee of private property of Art. 14 *GG*. This is only permissible for reasons of the public weal, and even then full compensation is demanded by the rule of law [*Rechtsstaat*]. Expropriation is a special sacrifice that is imposed upon the proprietor actually in contradiction to the principle of equality before the law. Thus his compensation must represent the true value of his property. Only if the money offered as compensation corresponds to the value of the property without regard to a meanwhile legislated currency reform can the principle of equality be preserved; to grant only a compensation at the schematic rate [provided by law] would be against this principle; for expropriation is a compulsory act of public authority (not a voluntary act of the expropriee) relating to a material good that *in se* is not subject to currency devaluation (in contradistinction to money debts and credits, obviously). To decide otherwise would be a grave violation of equity; and the principle of distributive justice would also be unbearably violated, especially since it has become clear meanwhile that this compensation according to the rate 1:1 cannot be considered as dangerous to the stability of the currency.

36. 13 BGHZ 296.
37. 11 BGHZ 156 (163).

We have seen that the *GG* and most of the *Länder* constitutions create a gradation or hierarchy among constitutional principles when they exempt the fundamental rights from the operation of the amending power. But the courts have come to recognize that these natural rights are protected by more than the positive provisions of the constitutions. They transcend all positive law, even positive constitutional law, although, to avoid the continual threat of turning fundamental rights into merely relative values, they are given explicit and solemn acknowledgment by the constitutions.[38]

> An encroachment by the legislature is permitted only when *higher* [*übergeordnete,* emphasis in original] reasons of justice [*Rechtsgründe*] justify the encroachment, not for reasons of political expediency. In this regard, it must always be remembered that in the gradated order of the *GG* these fundamental rights are themselves the highest juridical values [*Rechtswerte*].[39]

It is not merely against amendment in accordance with the procedure set up in the constitution that these rights are protected: they are limitations on the original constituent power (*Verfassungsgesetzgeher*) itself.[40] Thus, on the question of whether the rights enumerated in the first 19 articles of the Federal Constitution are available to invalidate formally valid dispositions made before the Constitution was adopted, the Supreme Court has this to say:

> They are referred to in the *GG* as inviolable and inalienable human rights (Art. 1, 2); not as granted by the Constitution, but as existing before it and independently of it. . . . Not even anterior law can be applied if it violates them. . . . The *GG* obliges every judge to acknowledge the suprapositive [*übergesetzlich*] rank of the genuine fundamental rights. That compels him to the juridical conclusion that these rights were valid always even *before* [emphasis in the original] the *GG* was formally ordained; they were thus juridically valid also during the rule of the Nazi regime.[41]

In the recognition of fundamental rights of limiting the constituent power, a leading role, along with that of the two highest Federal courts, was taken by the Bavarian Constitutional Court, whose first President, Dr. Josef Wintrich, is now President of the Federal Constitutional Court. The Bavarian

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38. BGH decision of October 17, 1955, 8 VERWALTUNGSRECHTSPRECHUNG 98 ff.), 3 BVERFG 135. Cf. Bavarian Constitutional Court (*Bayr. Verf. Gericht*) 1 II 29; 4 II 51 ff.; 9 II 111 in ENTSCHEIDUNGEN DES BAYERISCHEN VERFASSUNGSGERICHTSHOFES.
39. *Ibid.*, decision of October 17, 1955.
40. 2 BVERFG 51.
41. Advisory opinion 11 BGHZ 81 with regard to 6 BGHZ 208.

Court has held that "the right of respect for human dignity is an unconditional pre- and suprapolitical right [*vor- und überstaatliches Recht*]," [42] and that:

> The Bavarian Constitution sees in the elementary fundamental rights natural rights antecedent to positive law and due to all men. These rights are insurmountable limitations on all public authority, including the constituent power.[43]

Pursuant to these principles, the Bavarian Constitutional Court asserted the power to invalidate an express provision of its own Constitution:

> There exist such constitutional principles, which are so elementary and to such a degree an expression of right anteceding also the Constitution itself, that they bind the constituent power itself, so that other constitutional rules which have not the high rank of such principles may be declared null and void if they contradict these principles.[44]

The case concerned Art. 184 of the Bavarian Constitution, which says that the "validity of laws, directed against National Socialism and Militarism or which are intended to do away with their consequences, is not touched or limited by this Constitution." The Court said:

> If the intent of this article were, with regard to the so-characterized group of people thus characterized, to free the legislature forever from the restrictions placed on it by Constitution and justice, i.e., to put this group forever beyond the protection of Constitution and justice, then this article would be void as contravening the idea of justice, the principle of the rule of law [*Rechtsstaat*], the principle of equality before the law, and the fundamental rights which are a direct expression of the human person.

The decision of March 14, 1951, repeats and refines this dictum:[45]

> The constituent power, too, is bound by the *Recht* which in its very essence and meaning should serve the moral values of human dignity, of justice and thus of liberty. All public authority — and thus also the constituent power — is limited by the idea of *Recht*. Only if one presupposes, in agreement with extreme legal positivism, that the constituent power is the sole creator of *Recht* in the sense of an enforceable order with any content, may one criticize the earlier decision of the Court. . . . The Ba-

42. On the Bavarian Constitutional Court, cf. Josef Wintrich, *Die Rechtsprechung des Bayerischen Verfassungsgerichtshofes*, 4 RECHT, STAAT UND WIRTSCHAFT 139-170 (1953).
43. *Id.* at 141. Wintrich remarks that a dissenting member said that his standpoint of legal positivism made him dissent because of this enlargement of judicial review beyond the written Constitution; this is an *argumentum e contrario* for natural law.
44. 3 ENTSCHEID. VERF. G. 28 (Bavaria).
45. 4 ENTSCHEID. VERF. G. 51.

> varian Constitution itself recognizes the dignity of the human person, and equality before the law as substantive justice, as human rights antecedent to all positive law. It recognizes that the constituent power did not create these rights but found them. These highest principles of *Recht* and of substantive justice [*materielle Gerechtigkeit*] limit the sovereignty of the constituent power.[46]

It is clear from the whole tenor of these opinions that the Court is accepting the classical natural law doctrine in holding both the constituent and the amending powers to be subject to limitations.[47]

The Federal Supreme Court and the Federal Constitutional Court have accepted the doctrine announced in these decisions. The former said in an advisory opinion to the Federal Constitutional Court that a reference to "unconstitutional norms in the Constitution" is not a contradiction in terms when the Constitution contains positive norms of lower and of higher rank, as is the case with the *GG* (Art. 79) or when the norms of higher rank, such as the fundamental rights, are recognized as suprapositive rules, not created but merely recognized by the Constitution:

> That a constitutional provision may be void is not illogical for the reason that it is itself part of the Constitution. There are constitutional rules which are so much the expression of *Recht* antecedent to the Constitution itself that they bind the constitution maker himself. Thus other provisions of a lower rank may be declared null and void, because they contravene these higher ranking norms. There are once and for all certain constitutional norms which have supralegislative and even supraconstitutional rank, norms which the Constitution merely recognizes but does not create. The opposite opinion cannot be accepted, for it contends that the constituent power is wholly autonomous in establishing the value system of the Constitution. This denial of suprapositive *Recht* binding upon the constituent power would make a constitution-maker *rechtsmässig*, as if he intended only to legalize an arbitrary and tyrannical regime and thus make it binding on the judiciary.[48]

The Federal Constitutional Court said in an opinion concerning the principle of equality before the law:

> The idea that the original constituent power may ordain anything according to mere will would be a relapse into the spirit of a value-free legal

46. In a decision of January 19, 1956, the Court, despite all criticism, reaffirmed this doctrine. 7 ENTSCHEID. 55.

47. The opponents of the doctrine announced by the Court either are ordinary positivists or follow the "legal existentialism" of Carl Schmitt, whose "decisionism" and antinormativism have gained more and more followers recently.

48. 11 BGHZ 2, advisory opinion according to par. 80, BVGG.

positivism which has been overcome in recent juridical science and practice.[49] Experience under the Nazi regime has taught that even the legislator may posit injustice, and that, consequently, the ordinary administration of justice should be armed against a possible development of similar regimes so that, in the extreme case, it may be able to give effect to the principle of substantive justice [*materielle Gerechtigkeit*] in preference to the principles of the security and certainty of the legal order. . . . To determine what a lower constitutional rule is and if it is in contravention of a higher rule, to determine if the constituent power has kept within the ultimate limitations established by justice, is the privilege and responsibility of the judiciary, which draws its authority not only externally, as it were, from the Constitution but also from the idea of Right [*Recht*] itself.[50]

The two Federal courts regard the principle of equality before the law — or its negative formulation, the prohibition of arbitrary discrimination — as part of the "suprapositive" law [*Recht*]. This principle of equality must not be confused with the "schematic" equality (Wintrich) which would have it, for instance, that socially relevant differences such as being the head of a family, a worker, or a millionaire, cannot affect the right to vote. The suprapositive principle binding on the legislature is that

> Facts and circumstances [*Tatbestände*] of the same kind, which by reason of the nature of the matter, clearly demand in justice regulation on the basis of equality, must not, without objective and sufficient cause, and without regard for the demands of justice, be treated unequally; in this sense equals must be handled equally, unequals unequally.[51]

Few will doubt that by terms "suprapositive law," "material or substantive justice," "prepolitical rights," etc., natural law and natural rights in the commonly accepted sense are meant. It is also clear that these terms are in-

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49. The opinion quotes with approval the Swiss jurist Hans Marti (FESTGABE FÜR DEN SCHWEIZER JURISTENVEREIN) on sources of law in Swiss law: "In each constitution definite values find their realization. . . . A constituent power does not create a constitution out of nothing. It does not 'invent' new values but it finds these or other values already accepted. . . . These values and norms which it finds are by no means only moral norms without juridical relevance. Insofar as these norms claim a realization in the law (*Recht*) they are not merely ethical rules but already juridical principles (*Rechtsgrundsätze*). Thus they are above the constitution and the constituent power norms which seek recognition in positive law; they are principles of the rules of positive law."

50. 3 BVERFG 231. It should be pointed out that the Constitutional Courts of some Länder do not claim such a broad competency. Cf. BACHOFF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? 12 ff. (1951).

51. 11 BGHZ 26; 16 BGHZ 350; 6 BGHSt 168; 3 BVERFG 135; and J. WINTRICH, DIE VERFASSUNGSGERICHTSBARKEIT. . . , a lecture at the Academy of Administration and Economics, October 17, 1955, p. 2. See also Dürig, *Gleichheitsgrundsatz. . . ,* 79 ARCHIV FÜR ÖFFENTLICHES RECHT (1953-1954). The Bavarian Constitutional Court has been and is exemplary in this subject matter. See WINTRICH, RECHTSPRECHUNG DES BAYR. VERF.G. 143 (1953).

tended to designate immediately valid and thus judicially applicable law, not merely ethical standards and not merely regulatory principles or directives for the legislator.

This becomes clear in a decision of the Federal Supreme Court in which the relationship between the moral law and the judicial norm is discussed, and the strict separation between the two, so stressed ever since the time of Immanuel Kant, is criticized. The case arose under par. 181 of the Criminal Code, making it an offense for a person to permit or tolerate acts of sexual immorality (*Unzucht*) in his house by his child or someone to whom he stands *in loco parentis*. In this particular case, a mother permitted her daughter, who had had an affair with an older married man, and was pregnant by him, to live with him in her house, because they were "practically married." Since 1945, the Court of Appeals (*Oberlandesgerichte*) has been tending to interpret *Unzucht* in terms of the moral convictions of the classes of society (*Volkskreise*) in which the acts complained of took place. Under the conditions that have prevailed in some parts of the German population since the War, it is quite possible that this criterion could warrant an acquittal in this particular case. At any rate, the Court of Appeals of Düsseldorf so held.[52]

The criterion thus adopted — one reminiscent, incidentally, of the sociological school of jurisprudence in this country — denies an objective, generally valid, and obligatory order of values; instead, the judges substitute the changing opinions and behavior of changing strata of society which they scarcely can safely determine and of which they do not know whether they are backed by moral convictions or are merely the result of indifference. A deference to *sane* popular views is no solution, for the judge has to decide if a certain popular view is still sane or not. Without an objective standard the decisions of the judges must become arbitrary and subjective. The Court of Appeals simply refused to take issue with the various views, contending that it does not belong to the obligation of judges to decide about problems of ethics, since all these various views had their own moral justification. "This view," says the Supreme Court,

> cannot be right. It surrenders the very grave question full of far-reaching consequences which moral norm ought to rule, the relation between the sexes, especially between engaged couples, to an empty relativism, destructive in effect because only social reality without any evaluation serves as a standard. This simply means that human actions ought not to be ruled by norms but that these actions determine the norms. . . . The thesis that judicial decision must in principle never be based on ethical evaluations

52. Neue Juristische Wochenschrift 959 (1950).

is a deplorable falsehood. The inner obligatory power of the juridical law [*Recht*] is, on the contrary, based just upon its agreement with the moral law. The norm on which paragraph 181 of the criminal code rests is not a transitory convention; it is a norm of the moral law valid *in se*. Such norms are valid without regard to the changing views of the addressees, of their consent or dissent.

There is no doubt that the norms which regulate fundamentally the sexual relations and thus ordain the order of marriage, family, and remotely the living together of the people as obligatory norms are norms of the moral law and not transitory conventional customs. . . . Since the moral law prescribes monogamous marriage and the family as obligatory form of living together and makes them the basis of the life of nations and states, it simultaneously prescribes that sexual intercourse ought to take place only in marriage and that a violation of this rule is a grave violation of sexual morality. . . . Therefore one *cannot* say that the seriousness of the betrothal, the sincere will to marry is *for itself alone* an excuse from the moral law; for the *unconditional validity* of the *ethical norm* does *not permit any exceptions*.[53]

IV

In the preceding pages a selection of representative opinions of both the Federal Supreme Court for Civil and Criminal Laws and the Federal Constitutional Court has been presented. Perhaps the opinions of the Federal Supreme Courts in Labor and Social Law and of the Federal Supreme Court in Administrative Law might have enriched this essay. But even so it is quite evident that the revival of natural law in Germany is a concern not primarily of legal philosophers and professors of jurisprudence, but of judges. Some may try to explain this revival merely as a consequence of the terrible trauma that the National Socialist totalitarian Führer-State inflicted on the judicial power of government, *quelque façon nulle* — and totally *nulle* in the totalitarian state where it is a mere tool of the legally and ethically unlimited power. But such an explanation would be not only superficial but also somewhat insulting. The idea of natural law never did wholly disappear; it was forced perhaps, in Dr. Wu's happy phrase, to "go underground" or else to find refuge where, for specific reasons, it was always "at home," in the Catholic Church and its members.[54] Nevertheless, it may be said that the shock of the experience of

53. Emphasis in the original. 6 BGHSt. 46. The Court points out that the Nazi racial legislation, which forbade unjustly and arbitrarily marriages on racial discriminatory grounds, could offer an exception; but then these laws were themselves unjust and could not invalidate a serious marriage contract. This is in agreement also with canon law (C.I.C., c. 1098, 1); see also 6 BGH 147 (suicide).

54. Cf. Nathanael Micklem, National Socialism and the Roman Catholic Church 173 (London, 1939), on Catholic resistance against the totalitarian state by reason of a consistent theory of natural law.

the totalitarian "injustice as a system" (*Unrecht als System*) made it apparent even to those who had been satisfied with a concededly excellent and learned legal technique, without giving much thought to the foundations of law and rights, that all positive law, the constitutional included, rests on and must be measured by an objective justice and a perennial jurisprudence. This jurisprudence is valid *in se,* and in its essential content is independent of philosophical fashions and transitory moods of legislative majorities.

The juridical, i.e., *enforceable* norm, even in its formal aspect, is not wholly indifferent to content. This constitutes the inadequacy of the doctrine of the "pure theory of law," which sees only the normative, the ordering element, and the sociological guarantee of enforcement — in other words, norm and power, the formal elements of the law (*obedientia facit imperantem*). Positive law implicitly demands justice for its content. It can claim to be valid only insofar as it finds a free assent *actu et habitu* in the consciousness of those subject to it. Obedience is a moral virtue, not merely an external response to power, terror, or utilitarian expediency. It asks, as the virtue of free men, for reason and reasons. The juridical law is, beyond all technicality and sociological condition, related to ethical values as its content. As long as there prevails in the community a habitual consensus about these values, one can afford to be a positivist. But violent destruction by a revolution á la Hitler, or sudden mass disobedience after a slow process of relativistic corruption by irresponsible intellectuals, or any obvious contradiction between ethical values and social reality, causes an awakening from this satisfaction with the formal elements of the juridical order.

Besides these ethical values this order also contains and orders what Dietrich Schindler calls "vital necessities" of man living in society, namely, to care for his economic demands and to secure his life and that of his family for the future in a peaceful order.[55] While I cannot with certainty rely on obedience by others to the moral law, I can rely, because of the certainty of enforcement, on their external conformity to the juridical law as the "ethical minimum" without which neither order nor internal peace could prevail. This is also connected with the power element in the juridical positive law, which leads to the temptation to see in the law nothing more than the protection of the social *status quo* of power. All these elements are characteristic of the juridical law. In addition, in the periphery of the positive law, far away from the nucleus of the perennial content, we find rules of expediency and

55. VERFASSUNGSRECHT UND SOZIALE STRUKTUR (2nd ed., Zürich, 1944). It is interesting that Wintrich, as well as his critic Peter Schneider in ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 98-110 (1956) (*Naturrechtliche Strömungen in deutscher Rechtsprechung*) refers repeatedly to this master work.

mere utility, the result not of any necessary radiation of the idea of justice, but of a choice, among not even true alternatives, but rather among a plurality of possibilities determined mostly by time and habit, of which one may be as easily defended as another. Natural law, being the foundation and critical norm of positive law, demands positive law; and positive law needs ethical justification in the consciences of its subjects or it will be nothing more than a labile power relation among social groups and individual and collective interests.

The jurist in the daily technique of the law need not actually consider all these matters, for they are, despite their innate tensions, implicitly accepted in positive law. If, however, the tension, because of deep changes in the habitual consensus, becomes critical, there is a vital need of going to the fundamental and perennial principles of law. Positive law, then, needs the enduring critic provided by natural law; it must forever be confronted by objective justice. There is no intrinsic inherent antinomy between the perennial natural law and the time-and-nation-bound positive law characteristic of a given time and place; but the ultimate appeal of all positive law and its legislators is to the well-informed conscience — the depository of the natural law.

Needless to say, neither the opinions discussed above nor the appeals by the courts to suprapositive law have escaped criticism. In this criticism, the professed positivists, although they are the most vocal, are not alone. This is all to the good. The natural law jurist is not safe from temptations, be they those into which the jurists of the rationalist eighteenth century fell or those into which the United States Supreme Court fell in the decades just before and after 1900. Both temptations have been vehemently pointed out to the German courts. In the matter of unconstitutional norms within the Constitution a broad discussion ensued, although the two Courts were stressing that such a thing was not unthinkable although rather improbable.[56]

The Courts are aware of the limitations on their authority, namely, that they

> ought not to take over strictly legislative functions, the *free* positing of objective legislation. The borderline for the judiciary in constitutional law is where the political freedom of decision of Legislature and Executive begin. Only such acts as fall into this sphere are 'unjustifiable governmental acts' [*justizlose Hoheitsakte*].[57] The principle of the separation of

56. Cf. pro: BACHOFF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? (with bibliography) (1951); contra: HANS SCHNEIDER, GERICHTSFREIE HOHEITSAKTE (1951), to mention only two. See also Josef Wintrich, *Aufgaben, Wesen, Grenzen der Verfassungsgerichtsbarkeit,* FESTSCHRIFT FÜR HANS NAWIASKY (Munich, 1955); Erich Kaufmann, *Grenzen der Verfassungsgerichtsbarkeit,* VEREINGUNG DEUTSCH STAATSRECHTSLEHRER (1950).

57. Wintrich, *op. cit. supra,* note 56 at 204; Scheuner, in FESTSCHRIFT FÜR SMEND 295.

> powers does not, as has often been said, so identify law with statutory legislation as to prevent the development of judge-made law [*Richter-Recht*], if the judiciary by the development of general principles of law as they are given in the order of law [*Rechtsordnung*] finds norms applicable by the judiciary. On the other hand, it would be wrong for the judiciary to attempt, by its own free resolution and will, to establish new general norms for reasons of pure expediency or utility. The decisions of the judiciary by their very nature must be restricted to law [*Recht*] that can be judicially interpreted and/or concretized.[58]

Chief Justice Wintrich points out in this connection that the "concretization (by judicial decision) in the form of deriving more concrete norms from fundamental principles of law is more similar to the development of case law than to mere technical interpretation of the law."[59] This is a consequence of judicial independence and the equality of the judiciary with the legislative and the executive powers; and it is a slow approach to the judge-made law familiar to the Anglo-American tradition. Insofar as the constitution is based on, contains, or refers explicitly or implicitly to suprapositive norms or fundamental constitutive principles of the law itself, the judiciary is entitled in its specific function of interpretation and concretization to appeal to universal philosophical and ethical propositions, to an objective order of values transcending all positive law. All political authority, and thus also the constituent power, is, like all human power, limited immanently by the idea of justice, the dignity of the human person, and its essentially social and political nature.

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58. 11 BGHZ 35 (advisory opinion).
59. DIE VERFASSUNGSGERICHTSBARKEIT 10.

FACT, VALUE, AND HUMAN PURPOSE

Ernest Nagel

THERE IS, IN GENERAL, little intellectual nourishment to be found in rebuttals to rejoinders to replies. Nevertheless, even if rational debate accomplishes nothing else, it often succeeds in locating sources of misunderstanding; and it is with this minimal objective in mind that I am continuing my exchange with Professor Fuller.[1] In offering the following comments on his *Rejoinder* to my *Reply* I am impelled by the hope, not indeed of convincing him that his views on the issues under discussion are mistaken, but of persuading him that if, as he repeatedly complains, I have not grasped his thought, at least part of the reason for this may be unclarities in his own presentation and defense of his doctrines.

By way of preface, let me assure him that if I really have misrepresented him in my *Reply,* as he claims, I have done so unwittingly, and that if I have misunderstood him it has not been for lack of trying to comprehend his contentions. In preparing my *Reply,* I not only devoted much careful thought to his paper, but in the attempt to understand it I made myself familiar with his previous publications on the issues raised by him.[2] Moreover, I discov-

1. Lon L. Fuller, *Human Purpose and Natural Law;* Ernest Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller;* Lon L. Fuller, *A Rejoinder to Professor Nagel* — all in 3 NATURAL LAW FORUM (1958). All page references in the text are to this source.

In the same volume of NATURAL LAW FORUM, Professor Joseph P. Witherspoon contributes an extended comment on the exchange between Professor Fuller and myself, under the title, *The Relation of Philosophy to Jurisprudence.* Professor Witherspoon's essay is in considerable measure a sermon addressed to me on how to read a text, and in particular Professor Fuller's texts, since according to him I have failed to grasp the plain meaning of Professor Fuller's words. How reliable an interpreter of those words Professor Witherspoon is, I will not venture to say. However, the substance of his position, insofar as it is relevant to my discussion with Professor Fuller, is contained in his remark: "What law *is* cannot be separated from what it is *for,* and what it is *for* cannot be separated from what it *ought to be.*" (p. 108) Now in my *Reply* I made unmistakably clear that I believed the law is subject to moral evaluation, so that on my view also existing law is not to be *separated* from considerations of what the law ought to be. On the other hand, I argued that an evaluation of the law is not intelligible, unless we *distinguish* what the law *is* and what it *ought to be.* But in the light of my brief quotation from him, Professor Witherspoon accepts this distinction, and therefore appears to agree with me and to disagree with Professor Fuller, who does not countenance the distinction. I must therefore leave Professor Witherspoon's contribution to "the cause of intellectual community" for assessment by Professor Fuller himself.

2. For the sake of the record, I add the following information. My *Reply* was my contribution, as an invited ten-minute commentator on Professor Fuller's paper in a symposium on natural law, held at the 1956 annual meeting of the American Philosophical Association,

ered that other students of the subject, whose competence to deal with the questions under discussion I regard as indisputable, found difficulties analogous to those I encountered in Professor Fuller's views. It seems to me not unreasonable to suggest, therefore, that it is not entirely the fault of his critics if, as he maintains, they have failed to understand him.

I

Professor Fuller's central thesis, as formulated in his first paper, is that "in any interpretation of events which treats what is observed as purposive, fact and value merge." (p. 69) Although he rejects as "quite unresponsive" (p. 86) my argument that in making this claim he is at best asserting a tautology, to my regret he does not come to grips with my difficulty, and I have found nothing in his *Rejoinder* which requires me to retract my criticism as pointless. I have nevertheless profited from the restatement of his major thesis, and in consequence I believe I am able to present more clearly my continuing difficulties with his central claim. There are in fact three sorts of defects I find in his arguments for it: a confounding of several disparate senses of the word "evaluation" (and, correspondingly, of the word "value"); a failure to distinguish between a term as *evaluative* and a term as *vague;* and a confusion of the question whether or not men actually use a term without explicitly recognizing the distinction between fact and value, with the quite different question whether or not it is possible and important in such cases to make that distinction. It will not be convenient, however, to discuss each of these defects separately.

1. Professor Fuller fully agrees that the mind may have a "descriptive" as distinct from an "evaluative posture" toward reality, although in his view these postures merge when we are dealing with purposive events. He reformulates the issue as stated in his original essay in two related questions: "(1) Is it always possible to give an adequate non-evaluative account of any object that is itself the subject of an evaluation? (2) If so, does evaluation become legitimate (or 'competent') only when its object is first identified in such a non-evaluative account?" (p. 87) He maintains that the answer in each case is negative, basing his conclusion on a number of illustrative examples. However, the first question seems to me unclear as it stands, and requires some discussion of what is to be understood by "adequate" and "evaluation."

Eastern Division. Professor Fuller was one of the two main speakers in this symposium. My mandate was to comment on his paper, not to write an independent essay expounding my own views. Professor Fuller's repeated complaint that my *Reply* contains no affirmations of my own moral and legal philosophy therefore seems to me unreasonable.

a) Professor Fuller nowhere explains what is the force of the adjective "adequate." It is manifestly a value term, and involves at least tacit reference to some purpose or objective for the sake of which an account is undertaken. Thus, when a physicist offers a non-evaluative account of a given system of pulleys (i.e., when he assumes a "descriptive posture" toward his subject matter), if his aim is simply to discover what is the mechanical advantage of the system, his account is *not* inadequate because he fails to note the weight of the pulleys, the length and tensile strength of the cord, or the purchase price of the machine. On the other hand, a builder assessing the physical and economic suitability of the pulley system for lifting construction materials used in his business, *would* be giving an inadequate account were he to ignore these items. In brief, *every* account of things and processes, whether it is descriptive or evaluative, is instituted for the sake of some objective; and the adequacy of an account can be judged only by reference to the purpose for which it has been instituted. But although this point is obvious, it is also important. For it calls attention to the circumstance that an account may be entirely adequate (relative to a given purpose), even when the account is an admittedly non-evaluative one, despite the fact that it does not provide an "exhaustively" detailed and "absolutely" precise description of the subjects under discussion.

Nevertheless, Professor Fuller appears to ignore this obvious point when, in reverting to his original molluscoidal example, he claims that even if our concern in giving an account of the boy's behavior with the clam were "in the 'pure fact' of the occurrences there related — say, in the directions and dimensions of the boy's physical movements — we could envisage that 'pure fact' more accurately if we knew what the boy was trying to do." (p. 88) If our intent is to characterize the boy's behavior with a view to relating his activities to his purpose (assuming that he has one), we will undoubtedly attend to different things in his total behavior than if our intent were something else; and even if our interest is to evaluate the boy's behavior as a means for achieving his aims, we will doubtless note varyingly different features in his actions should we modify our conceptions (or hypotheses) concerning the boy's objective. Professor Fuller is very perceptive when he calls attention to "the effect of a disclosure of the boy's purpose in bringing about a sudden enlargement of perspective." But I can find no warrant for his assertion that when we realize what the boy is trying to do, we are able to give a more accurate account of the boy's physical movements. For the accuracy of an account, like its adequacy, can be judged only in reference to the purpose for which the account is instituted. However, since an account undertaken for assessing the boy's behavior as a means for realizing his ostensible objective

has a different purpose than an account undertaken for describing the directions and the dimensions of his physical movements (perhaps for the sake of determining whether the boy has recovered from a crippling illness), the adequacy or the accuracy of the latter account follows from the former one neither in strict logic nor in normal fact. This is not the only example in which Professor Fuller has apparently forgotten that the adequacy of an account is relative to the purpose controlling that account. I shall try to show that his claim concerning the merging of fact and value is in part the consequence of his not remembering this point.

b) The primary, though I think not exclusive, sense in which Professor Fuller employs the term "evaluation" is for judgments in which the worth of some action, process, or object is assessed as a means for achieving some end, however tacitly or vaguely the end may be entertained, and whether or not the judgment is explicitly formulated. At any rate, this seems to be the sense required in his discussion of the original molluscoidal example, as well as of several others he advances in his *Rejoinder* in support of his central thesis. Some of these latter examples are especially helpful to me in stating my difficulties; and since I would be repeating myself were I to comment on each of Professor Fuller's illustrations, I will examine only two of them in the present context.

i) Professor Fuller raises the question whether the "existence" of a "legal order" in some society can be decided without evaluations being involved in the process. However, he declares that "the *ideal* of a legal order is never attained perfectly," so that "the 'existence' of a legal order is always a matter of degree and cannot be measured in 'non-evaluative' terms." How, then, he asks, "in determining whether a legal order 'exists' do we distinguish between the 'existent thing' and its 'value'?" (p. 91, my italics) Moreover, he suggests it would be absurd to maintain that we must first describe in neutral, non-evaluative terms "every existent thing embraced by such a judgment [i.e., a judgment as to whether a legal order exists] before the judgment itself can be 'competent.'" (p. 92)

I have several comments to make on this example of an alleged merging of fact and value. Professor Fuller is perhaps calling our attention to the familiar difficulty of formulating a "suitable" general definition of "legal order" (although I am sure he intends more than this) precise enough to enable us to decide in a uniform manner whether a given social system (e.g., Hitler's Germany) is an instance belonging to the extension of that term. But in any event the term "legal order," like many other terms in common use, has no precise definition, certainly not one that is acceptable to all who employ it. Although there may be a considerable measure of uniformity in the way men

apply it in many instances, it is also clear that many individuals differ in the criteria they associate with the term for its correct application. Accordingly, two individuals who disagree on whether a given society possesses a legal order, may disagree not because they base their predications on different descriptive (or non-evaluative) accounts of the society, but simply because they operate with different standards for the correct application of the label. In an analogous way, a bat may be characterized as a bird by one person and denied that characterization by another, because the connotations of the term "bird" are for them not the same, even though they agree in all other respects in their accounts of the object both have observed.

Now although Professor Fuller is not proposing a fully developed definition of "legal order," he does suggest what for him must be a component in any acceptable definition of the term. If I do not misread him, he is saying that no system of politically enforced regulations can properly be called a "legal order," unless the system approximates to an "ideal" order, and so embodies patterns of human behavior which both conforms to certain minimal moral standards and contributes to the realization of a progressively unfolding series of moral ends. Accordingly, so I understand him to maintain, it is not possible to decide whether, for example, a legal order did exist in Nazi Germany without characterizing the operations of Hitler's society in evaluative terms. I will not dispute here the suitability of a definition of "legal order" along the lines Professor Fuller suggests (despite my doubts about the desirability of a definition of the term which would require us to refuse this title to a "thoroughly bad" system of politically instituted and enforced regulations), since the precise form which a definition of the term ought to take is not pertinent to the issue under discussion. I gladly admit that if the term is to have any connotation, there must be *some* minimal conditions for its correct application; and I also freely grant that a definition such as the one Professor Fuller appears to have in mind is entirely possible. Nor do I deny that on his and similar conceptions of what is a legal order, any decision as to whether or not a legal order exists in a given society involves the use of evaluative terms. For if such conceptions are adopted, it is trivially or tautologically true that evaluative terms must be employed. What does puzzle me, however, and leads me to wonder whether I do understand him, is why Professor Fuller thinks he is not asserting the tautology to which I tried to call his attention in my *Reply*.

It is barely possible that Professor Fuller finds my criticism "unresponsive," because I have not made sufficiently clear that when anything is characterized in what I propose to call "functional" terms, the use of such terms *necessarily* requires evaluative judgments. Let me therefore try to make my point with

a biological example. A certain organ in the human body can be identified as a kidney by way of its gross anatomy, so that in the anatomical sense of the word we can give an account of some particular kidney (or of kidneys in general) in what are commonly regarded as non-evaluative terms. However, we have discovered that one of the normal functions of kidneys so identified is to maintain the blood in a certain chemical state. We may in consequence (and indeed frequently do) include this capacity of the organ in our conception of what it is to be a kidney. We may in fact make it part of our notion that to be a kidney an organ must maintain the blood in an "ideal" chemical balance, even if we should discover that actual organs vary in their capacity to do so; and we may in consequence come to regard it "a matter of degree" whether a given organ is really a kidney. On either of these two suppositions, however, the term "kidney" in its functional sense is an evaluative term, since we can determine whether a given organ is a kidney only by assessing its performance as a means for achieving a certain end.[3]

Similarly, in the sense associated with it by Professor Fuller, the functional term "legal order" is *necessarily* an evaluative one, because in that sense no system of human activities is a legal order if it is not conducive to the maintenance and the realization of certain moral objectives. Accordingly, though we may all agree in all our non-evaluative accounts of the Hitler regime, if there is room for doubt whether the decrees and enactments issued under the Nazis, together with the mechanisms of enforcement, were means for attaining those objectives, there is ground for doubt whether a legal order existed under Hitler. But if my statement of Professor Fuller's view is reasonably accurate, is he not after all asserting a tautology when he claims that this example illustrates a merging of fact and value?

But in any event, he heaps scorn on the notion that for an evaluative account to be legitimate, its object must first be identified in non-evaluative terms. He declares that to urge this notion is

> like saying that unless we can trace the precise trajectory of a marksman's bullet we have no right to assert that it missed the target. Surely we can say that a legal system is missing its target without having to report the precise angle of divergence of every human action that contributes to that missing. We can also say of something that calls itself a legal order that it is missing that target so woefully that it cannot in any meaningful sense

3. To avoid misunderstanding, I want to emphasize that on my view it is a *discovery* that kidneys identified by way of anatomical features do in general have this capacity, and not the result of any decision concerning the connotation to be assigned to the word "kidney." However, if in the light of that discovery we decide to modify the initial sense of the word, it is a consequence of this *decision* that to be a kidney (in the new, functional connotation of the word) necessarily implies the possession of the indicated capacity.

> be termed a system of law. It has, if you will, so little "value" that it has ceased to "exist." (p. 92)

Ridicule and exaggeration, however, though they doubtless have their use, do not really turn the point of an argument. Professor Fuller is battling with straw men if he supposes those whom he calls "positivists" to maintain that a necessary condition for a competent evaluation is an absurdly minute and photographically precise non-evaluative description of the object evaluated. It has apparently not occurred to him that the sole alternative to an evaluative account is not an impossibly detailed non-evaluative one. And he seems to have forgotten in this instance, as he did in the example I discussed earlier, that every account is unavoidably selective, and that the adequacy of a non-evaluative account has to be measured, not against an ideal of "absolute" precision, but in relation to the particular purpose that instituted it. Accordingly, since a non-evaluative account that is not exhaustive of its subject may nevertheless be adequate to the purpose of the account, and since the judgment that an account is adequate involves an evaluation, I can explain Professor Fuller's tacit assumption that a non-exhaustive but adequate account of its subject must somehow be evaluative, only on the hypothesis that he mistakenly thinks the evaluative character of a *judgment of adequacy* of an account entails that the account is itself evaluative.

However this may be, I do not understand how anyone is able to evaluate anything responsibly, unless he can identify that thing in non-evaluative terms. If he is unable to do so, even though in a relatively sketchy and imprecise way only, I find it a puzzle to know *what* is being evaluated. I am, of course, *not* maintaining that such non-evaluative descriptions are in all instances explicitly formulated, and are invariably distinguished from evaluative judgments. Thus, the builder in my example above may not formally assert such statements as "The cord in this pulley is 200 feet long" and "This pulley is capable of doing the kind of jobs I need done in my business more effectively and economically than any other machine now on the market." Nor may the builder be aware in making such judgments (whether or not he states them explicitly) that one of them is descriptive while the other is evaluative. I *am* maintaining that the builder can be evaluating something only if he identifies that thing (perhaps only by way of unformulated perceptions) in non-evaluative terms. Moreover, I believe that when some evaluation of ours (such as my builder's) is challenged, we can meet the challenge responsibly only if we first articulate our descriptive characterizations, distinguish as carefully as we can our tacit evaluations from our factual claims, and perhaps (in order to make our evaluations more reliable) increase the detail and the

precision of our descriptive accounts. Professor Fuller questions the utility of such descriptive accounts, at any rate in his discussion of the "existence" of a legal order, on the ground that "the only significant thing [we] can say about [a] social complex is that it *does* fall short of the ideal of a legal order." (p. 92) But their utility seems to me obvious, if we are at all concerned with diagnosing a social complex, with the objective of changing what is actual in the direction of a better approximation to some ideal. Does Professor Fuller have a better alternative to the general policy of determining what is the actual state of affairs (with a degree of precision depending on the problem), as a condition for competent prognosis and therapy?

ii) Consider next Professor Fuller's example of the dancing couple who bring suit for improper discharge from employment, where the point at issue is whether or not the couple really did perform a tango. He notes that in such cases the judge must decide what form the testimony of witnesses may take; and he suggests that witnesses might not be required to describe the dance they saw performed "in terms of physical motions," and would be permitted to testify somewhat in the fashion: "Whatever they were doing, it was not a tango." (p. 93) Professor Fuller therefore concludes that an adequate account of the action in dispute in this case would not be presented in non-evaluative terms, so that in this instance, at any rate, ostensibly factual description and evaluation coalesce.

My comments on this example will be brief. I have already argued that it is a blunder to suppose that the sole way of characterizing anything in non-evaluative terms (in this instance a dance) is to describe it "in terms of physical motions" — where such a description will count as an adequate one only if it states every detail in the pattern of motions embodied in the performance. Moreover, were this standard for a non-evaluative description adopted, most, if not all, of the accounts of things we are accustomed to regard as non-evaluative would then have to be rebaptized as evaluative ones. Accordingly, by doing violence to the accepted distinction between judgments of fact and judgments of value (i.e., to the sense of the distinction in terms of which the issue raised by Professor Fuller is formulated), the question under discussion would be settled in Professor Fuller's favor — but only by redefining the terms used in stating the issue, and so reducing the latter to triviality. Thus, when we characterize a certain occurrence as the flight of a barn swallow, few of us are capable of rendering in explicit language the detailed patterns of the bird's shape, coloring, or motion. Nevertheless, most of us would probably deny that in describing that occurrence in the stated manner we are engaged in an evaluation. Whatever it is that we are doing when we declare that a certain occurrence is the flight of a swallow (or that a certain performance is

not a tango), we are *not* making an evaluation in the sense of assessing the worth of a thing as a means for realizing some objective.

But what is it that we are doing in such cases? It will be helpful to note that the terms ordinarily employed in identifying and describing things connote more or less extensive (and more or less precisely delimited) classes of attributes. Accordingly, no term is correctly predicated of a given object, unless the latter does in fact possess all the connoted attributes. On the other hand, we rarely make sure (sometimes because we are not in the position to do so) when we predicate some term of an object that the latter actually possesses each of the connoted attributes; and in consequence, the available observational evidence on the basis of which a term is applied to an object is usually (if not invariably) logically insufficient to guarantee with demonstrable certainty the correctness of the predication. For example, the connotation of the term "oak tree" includes the attributes of having leaves with a characteristic shape, a bark with a distinctive texture and color, a trunk and limbs with a certain grain and degree of hardness, a capacity for producing acorns, and so on. But when judging a tree to be an oak we do not normally first establish that the object really does have all these traits, and we base our judgment on noting the presence of a relatively small number of them.

Nevertheless, though in cases of this sort the observational evidence for a predicative judgment may be logically incomplete, the incompleteness may vary. In some instances the evidence may be so extensive that the judgment is accepted as beyond reasonable doubt. In other cases the evidence is far less compelling, and the judgment is felt to be only probable in some degree. In short, predicative judgments are commonly asserted on the basis of incomplete evidence, which must be "estimated." This estimation is sometimes a conscious and deliberate weighing of the evidence. At other times, especially in routine situations of life, there may be no explicit consideration of the observational data; in such cases a deliberative estimation is replaced by habit, so that predicative judgments are asserted — with varying degrees of confidence on the basis of the observed data — almost automatically. But to estimate the weight of evidence, in whatever way such an estimate may be made, is to engage in an activity that is not improperly characterized as an "evaluation" — though in a sense of the word distinct from the senses thus far discussed. Certainly the witnesses in the dancing couple example, who testify whether or not the couple were performing a tango, are *not* offering an evaluative account of the performance, in the sense that they are assessing an action as a means for realizing some purpose. They *are* offering an evaluative account, in the sense that their predicative judgments are ostensibly based on estimates of the evidential weight of their observed data. Accordingly, I

concur entirely in Professor Fuller's view that "there is an element of responsible decision in all intellectual activities" (p. 93), if this means that the decision in question involves an evaluation in the sense just indicated. However, unless different meanings of "evaluation" are confounded, the occurrence in the dancing couple example of evaluations in the present sense does not support his claim that the example illustrates the merging of fact and value.

2. Professor Fuller thinks that the administration of the law presents special difficulties for the view that "in any actual process of human decision [there is] a rigid separation of fact and value." (p. 92) I have already discussed the case of the dancing couple, one of the several examples he employs in this connection to support his thesis. I want to examine another example in this group, in order to exhibit another facet in my difficulties.

Professor Fuller cites the rule that if one party to an oral contract was negligent in interpreting the terms of the agreement while the other party was not, the court will enforce the contract in accordance with the understanding of the prudent party. He appends the comment that "the term 'negligence' is plainly a term of evaluation, but there is generally in the law no 'non-evaluative' colligation of the things or instances to which this term should be applied." (p. 94) I need hardly say that on questions of law I am happy to be Professor Fuller's pupil. However, when he declares that "negligence" is "plainly a term of evaluation," he does not seem to me to be making a judgment simply in his capacity as a distinguished legal scholar. To be sure, the term "negligence" contains an evaluative component, as does the biological term "kidney"; for an action is characterized as negligent with reference to the likely consequences to which, in the light of our general experience, actions of that type are believed to lead. It is also undoubtedly the case that there is in general no descriptively characterized and precisely demarcated set of things to which the term is applied in the law. Nevertheless, as innumerable writers on legal subjects have noted (and I hope I do not appear to be presumptuous in venturing to remind Professor Fuller of this), the law of torts recognizes standards of nonnegligent action — even if those standards are determined in part by uncodified custom, are elastic, and are subject to alteration as society itself changes. Accordingly, the term "negligence" is not *merely* evaluative (any more than is the term "kidney"), so that in a large number of instances its application is controlled by rules referring to paradigmatic situations that are identifiable in non-evaluative language.

On the other hand, the term "negligence" is notoriously a highly vague one. It is vague in the sense that the term "bald" is also quite vague, while for all practical purposes the term "kidney" is not — in the sense, namely, that there is a large class of actions for which habits of usage are indetermi-

nate as to whether or not the term applies to them. In consequence, when borderline cases become subjects of litigation, a decision must be made whether or not to include them in the extension of the term. Such decisions are frequently made in the light of evaluations of the conjectured consequences of those acts, and under the influence of the purposes (whether explicit or tacit) of those making the decisions. Nevertheless, the fact that evaluations and purposes enter into the formation of such decisions does not blur the distinction between "is" and "ought." On the contrary, that fact does not make nonsense of the question whether, prior to a decision to count a given action as an instance of negligence, the action *ought* to be included in the scope of some law dealing with behavior deemed to be negligent, or whether, subsequent to that decision, the action *ought* to have been so included. Unless an action, even though a borderline case for the application of the law, is presented to a court by way of an account which is at least partly non-evaluative, I confess my inability to understand what there is for the court to decide.

Accordingly, when individuals disagree in their judgments on whether or not a given action is marked by negligence, their disagreement may have various reasons: The individuals may agree in their conceptions or criteria of negligence, but may differ in their evaluations of the likely consequences of actions similar to the one under consideration; they may agree in their criteria, but they may be basing their judgments in this particular case on different non-evaluative accounts of the action being discussed; or they may disagree (just as men often disagree in classifying some person as bald) primarily because of the vagueness of the term "negligence" and because the given action is a borderline case. Professor Fuller's claim that the term "negligence" is "plainly a term of evaluation," and that its use illustrates the merging of fact and value, thus seems to me to be a consequence of his lumping together under the ambiguous rubric "evaluation" such quite distinct factors that may control men's judgments.

Professor Fuller's examples show beyond doubt how difficult it frequently is to make descriptive judgments not colored by tacit assumptions concerning human purposes and by implicit moral evaluations. But he is flaying an imaginary whipping boy when he castigates those who believe a distinction must be made between "is" and "ought," if he supposes them to maintain that the distinction is one that men invariably make or can make easily and without effort. He is not arguing to the point when he notes, in support of his major thesis, that the Opinion Rule is condemned by careful students of the law of evidence. For the issue, as I understand it, is not whether most witnesses are able to disentangle fact from opinion, or fact from value, especially when they are testifying on matters in which they may have received no serious

training. The issue is whether the distinction between "is" and "ought" is not implicit in all moral deliberation, and whether, in the interest of making our evaluations more responsible, a persistent effort to make that distinction explicit in practice is not of highest moment.

II

I now turn to Professor Fuller's view that there is "a process that may be called the collaborative articulation of shared purposes," exhibited not only "in the affairs of daily life" (p. 73) but also in the history of the common law. (p. 74) In my *Reply* I stated my agreement with his rejection of an atomistic conception of human purposes and goals. But I also expressed my disagreement with what seemed to me to be a "holistic" interpretation of individual and social purposive action which he adopted, an interpretation according to which, as I understood it, there is an implicit collaborative pursuit of valid "forms of social order" by men, even when this end-in-view is not explicitly entertained by them. In his *Rejoinder* Professor Fuller charges me with misquoting him, when I criticized him for maintaining that men pursue such objectives even when they are "out of view." (p. 95) However, this is a gratuitous accusation, and he obviously did not consult his original essay from which the quotation (n.b., not *mis*quotation) was taken and to which page reference was given. But in any event, in his *Rejoinder* he repeats the substance (though not the phrase "out of view") of the position I had criticized, for he declares that "in disposing of controversies and issuing directives we may operate within a framework of purposes which conditions our decisions even though only certain of these purposes are called into consciousness by the facts of the case at hand." (p. 96) Since in my *Reply* I did say that "an end-in-view that is nevertheless not explicitly present in active consciousness seems to me just a myth" (p. 81), I am bound to explain why in my opinion Professor Fuller *is* accepting a myth as "an almost obvious truth of psychology." (p. 96)

Let me say at once that like Professor Fuller I accept as an obvious truth the familiar fact that many of our purposive actions, directed toward realizing some objective lying in the future which had been consciously envisaged by us as an end-in-view at some time or other, are performed by us through force of habit, so that the objective is not continuously in consciousness during the action. For example, it would never have occurred to me to question such facts as that I often leave a friend's home with the intent of returning to my own residence, and then walk, board a train, converse with companions, and do much else besides, without the thought of my objective crossing my

mind during most of the process. Nor do I question that I may gather with neighbors with the aim of developing plans for getting better schools in our community, but that this objective does not remain in the foreground of anyone's attention at every moment of the discussion, and that none of us had any clear ideas at the start of the meeting as to what such plans involve. I do deny, however, that if, as a consequence of a set of actions which have been deliberately instituted for realizing a certain goal, a quite different outcome is obtained that was neither intended by anyone nor ever consciously entertained even as a possible end-result, this actual outcome is the "end-in-view" that controls and determines the various decisions which may have been made during the process. I readily admit that the ends-in-view we consciously pursue are often only vaguely conceived by us when we begin to deliberate about ways to realize them or when we initiate some action in order to realize those ends; and I also admit with equal alacrity that when such initially vague objectives become more definite, and are perhaps even realized in some precise but surprising form, we may judge the outcome of our deliberation or action as something that we had "really wanted" from the beginning. But I regard it as a myth to suppose, and at best as a perversion of language to say, that the *unintended* product of our actions is the "end-in-view" toward which those actions had been *directed* all along. Such a supposition seems to me no less a myth because it is professed by some contemporary schools of psychology, which maintain that unconscious *purposes,* though never actually entertained by an individual, are nevertheless the "objectives" and determinants of his behavior.

In point of fact, Professor Fuller does not make it easy for his readers to grasp what he understands by the "collaborative articulation of shared purposes." In his original essay he rejected the claim that it is futile in human affairs to debate means until ends are proposed; and he construed the history of the common law in particular as a process in which rules of law are improved, not only to achieve the explicit ends-in-view courts entertain in interpreting precedents when applying them to the concrete cases under litigation, but also "in the light of ends then out of view because not stirred into active consciousness by the facts of the case being decided." (p. 74) In my *Reply* I agreed that there is indeed a collaborative articulation of shared purposes, in the sense that at various times and among various groups of men there are collaborative attempts at establishing and articulating common goals.[4] But I took issue with what seemed to me the possible import of Professor Fuller's words that however much men may be separated in space and

4. Professor Fuller takes me to task for admitting the existence of a collaborative articulation of shared purposes only with the qualification stated in the text. He construes the

time, and however little they may be explicitly aware of any common objectives, mankind is a single community engaged in a collaborative search for "forms of social order," and that the history of the common law illustrates this collaborative articulation of shared purposes. And I rejected this view, though I expressed doubt whether Professor Fuller subscribed to it, on the ground that it is mythical (in the sense of the preceding paragraph) and that it is incredible history.

In his *Rejoinder* Professor Fuller dismisses my criticisms of this view as beside the point and as not pertinent to anything he said in his original essay. He now reformulates his thesis, and helpfully offers a temporally ordered series of five (imaginary but allegedly typical) judicial decisions to illustrate the collaborative articulation of shared purposes in the common law. Nevertheless, I still fail to understand what his thesis is, if it is not the one I found untenable in my *Reply*. He declares his examples "show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were all trying to do from the beginning" (p. 98) — as if I had denied that communication between men often clarifies common purposes. The difficulty I find in the examples is that though they supposedly illustrate a collaborative articulation of shared purposes, Professor Fuller himself suggests that each judicial decision in the series can be assumed to be separated from its predecessor by a half century, and that courts deciding the five cases might well be those of five different nations. But what reason is there for supposing that the problem confronting the court in the fifth decision was envisaged by the first court, or that the actual purposes and ends-in-view of the first court were shared by the last one in the series? If there is no compelling evidence for such supposals, how does Professor Fuller differentiate his view from the one I criticized in my *Reply*, and why does he think he is not subscribing to the mythical notion of purposive human action which I had attributed to him?

Let me therefore cite some actual examples of judicial decisions rather than contrived ones. To the best of my knowledge, no one has shown that a common, shared purpose underlies the series of judicial decisions concerning

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qualification to mean that according to me such processes take place "only within a group where some uniformity of social values has already been impressed on its members by a common social environment." He therefore asks with obvious irony "why collaborative discussion could clarify or improve a culturally conditioned uniformity." (p. 85) However, Professor Fuller has read my qualification in a sense I had not intended; and I certainly did not maintain, as he suggests I did, that it is absurd to suppose "a pooling of insight and experience could assist the members of the group to understand more truly their own ends." As I explain in the text above, my qualification was intended to express my rejection of the notion that a single "purpose," at best only occasionally at the focus of explicit attention of a relatively small number of men, underlies the development of such institutions as the common law.

the liability of manufacturers of "things by their nature dangerous," beginning with *Thomas v. Winchester* in 1852 and terminating in *MacPherson v. Buick Motor Co.* in 1916. I do not find it obvious that there is such a purpose; a reading of some of the leading decisions in this bit of legal history does not seem to me to support the claim that there is one; and in any event the hypothesis that there is one does not, as far as I can make out, help to explain why the notion of inherently dangerous things has undergone the transformations that it did. Similarly, it is far from evident that the purposes of the U. S. Supreme Court in *Plessy v. Ferguson* in 1896 were shared by the Court in 1954 when the latter reversed the "separate but equal" rule laid down by the former. At any rate, I can find little but an expression of a blind act of faith in the view that the history of common law is the history of an implicit search for "those principles which will promote a satisfactory life in common for the human beings we know and understand." (p. 99) It is a conception of history dominated by the tendency, so rightly censured by Professor Butterfield, of seeing in the outcome of a series of historical changes "a purpose that has been attained, when very often it is a purpose that has been marred." [5]

Perhaps because I have failed to understand Professor Fuller's thesis concerning the collaborative articulation of shared purposes, I have also failed to find in his *Rejoinder* a resolution of my difficulty in seeing any connection between that thesis and his central thesis on the merging of fact and value. To be sure, he may believe that the truth of his views on the moral purposes underlying the development of the common law entails the truth of some form of natural law doctrine, so that the principles which promote a satisfactory human life are eternally valid and are gradually discovered through the collaborative articulation of common purposes. In consequence, if there were such an entailment, that doctrine would be a necessary presupposition of the interpretation of the development of the common law which Professor Fuller appears to hold. However, the conception of the nature of moral principles and moral values implicit in that doctrine has been historically associated with a firm *distinction* between the "is" and the "ought," and certainly does not imply the denial of this distinction. Accordingly, even if this doctrine as well as Professor Fuller's perspective on the history of the common law were accepted as sound, his views on that history would nevertheless not constitute relevant evidence for his central claim that fact and value merge. I am therefore compelled to render the Scotch verdict that a connection between these views and this central claim has not been proven.

5. Herbert Butterfield, The Whig Interpretation of History 40 (London, 1931).

III

I would like, finally, to comment briefly on two subsidiary issues Professor Fuller raises in his *Rejoinder.*

1. Professor Fuller asserts that the general acceptance of the thesis espoused by me (he does not explicitly say which thesis, but the context suggests that it is the one which maintains the "is" and the "ought" to be distinct) is responsible for the triviality of prevailing ethical philosophy. (p. 99) Although I believe neither his description of current ethical philosophy nor his wholesale condemnation of it is well informed, this does not seem to me to be the occasion for citing chapter and verse in disproof of his contentions. But I cannot bypass this opportunity to express my astonished wonder over the novel claim that to maintain a sharp distinction between "is" and "ought" is to court triviality. It is a distinction to which Aristotle, Spinoza, Kant, Mill, and more recently Santayana, M. R. Cohen, and Dewey subscribed, to name but a few thinkers who helped me to realize its importance. And I must add, for whatever it may be worth, that until Professor Fuller raised the issue, it had never occurred to me that the ethical philosophies of these men are trivial. I must also confess, furthermore, that until he expressed an ostensible doubt whether there is "any ethical theory that does not profess 'the natural law doctrine' and yet yields 'objective standards for the moral evaluation of the law'" (p. 85), I had always assumed that Mill and Dewey, among others, did propound ethical theories which propose objective standards of moral evaluation.

2. Professor Fuller comments adversely on the notion, stated briefly and only in passing in my *Reply,* that judgments of value are hypotheses about ways of resolving conflicting needs and interests. For he maintains that no theory of law is acceptable which holds the purpose of the law and of morality to be exhausted in the resolution of conflicts. (p. 103)

I would be seriously lacking in appreciation of the complex problems any ethical theory must solve, were I to attempt at the tail end of what is essentially a polemical article an adequate statement and defense of the conception of value judgments which I professed in my *Reply.* I can do no more on this occasion than indicate briefly why Professor Fuller's strictures on that conception seem to me without force. In the first place, he observes quite rightly that not all conflicts are harmful, and not all require legal intervention. He therefore rejects as inadequate the conception that value judgments are hypotheses for resolving conflicts, on the ground that this conception does not state how beneficial conflicts are to be distinguished from harmful ones. However, my brief formulation of that conception was not advanced as a

full-scale analysis, but only as an indication of a necessary condition for the institution of value judgments, not the sufficient conditions for their introduction. The formulation was intended to suggest why value judgments cannot rightly be regarded as self-certifying, and why questions concerning their validity can be settled only by reference both to the actual ends-in-view men entertain in given situations as well as to non-evaluatively described matters of fact (including the satisfactions and dissatisfactions men obtain, or are likely to obtain, from pursuing those ends). But in any event, I agree with Professor Fuller (if that is indeed the point of his criticism) that the distinction between beneficial and harmful conflicts cannot be made exclusively in terms of the notion of conflict. For without reference to the kinds and varieties of satisfactions and dissatisfactions men obtain from their activities, the distinction makes no sense to me. However, no proponent of the conception of value judgments under discussion has to my knowledge ever assumed anything to the contrary. The first part of his criticism therefore seems to me to be directed against a nonexistent target.

But Professor Fuller also maintains, in the second place, that if the resolution of conflicts is to be effected through a rational process, principles must in time be developed that enter into and shape the lives of men for good and evil. He therefore rejects the view of value judgments under consideration, because it allegedly fails to state how those principles are to be articulated by which conflicts and disputes are to be decided. However, though to be sure my *Reply* did not discuss these questions, the standard and readily available literature on the subject certainly does, so that the allegation seems to me baseless. In brief, the answer to Professor Fuller's censure is as follows. Certain types of conflict generate consequences that are discovered to be injurious to the well-being not only of those who may engage in them, but in various ways and degrees of other members of a community. These conflicts are also discovered to be capable of regulation, where some forms of regulation turn out to acerbate the undesirable consequences of conflicts, while other forms are found either to diminish the harm those conflicts produce or to divert the springs of human action into channels so as to generate consequences which augment human satisfactions. Accordingly, the principles by which conflicts are to be decided are principles whose use has been discovered to yield greater human satisfactions or lesser dissatisfactions or both, and in general to increase the happiness and well-being of the communities of men in which those principles are employed. This answer certainly offers no solution to any concrete problems in which conflicts require to be adjudicated. It suffices to show, however, that Professor Fuller's criticism is far from fatal.

Professor Fuller's animus against those he calls "positivists" — a category which appears to include everyone who maintains a firm distinction between "is" and "ought" — seems to me to have its source in the curious belief that anyone who accepts this distinction is barred in principle from evaluating the law in terms of objective moral standards. But such a belief is not only incompatible with the historical record concerning the role of "positivistic" philosophy as a critique of social institutions. The belief is also based on a false conception of how the study of fact can be related to the study of value. I find it difficult to escape the impression that those who hold the belief accept it on grounds of a fallacious argument — an argument entirely analogous to one which would conclude that a biologist, seeking to ascertain the various characteristics of microorganisms, whatever may be the import of such organisms for human life, is thereby precluded from distinguishing bacteria harmful to the human body from bacteria beneficial to man.

AN EXAMINATION OF THE THOMISTIC THEORY OF NATURAL MORAL LAW*

Kai Nielsen

THEORIES OF NATURAL MORAL LAW have deep roots in our culture. They have emerged again and again in our western tradition, not, however, without important variations. They are less appealing in times of social and political stability than in times of social crisis. In times when man turns against man, voices are always raised to remind us that man by virtue of his very humanity has certain inalienable rights and certain absolute correlative obligations to his fellow man. Like Antigone, we appeal to moral laws that transcend an ethnocentric "closed morality" of social pressure. In our recent history, liberalism, both theoretically and practically, has faced dilemmas; liberalism has been subjected to penetrating and varied challenges. Saddled with this situation, some theologizing political scientists have hoped to find in the classical doctrine of the natural moral law a "new" and more secure moral foundation for democracy and a solution to the modern liberal predicament. As incisive a student of the changing human scene as Walter Lippmann, has in his *The Public Philosophy* attempted a modern adaptation of the classical natural moral law theory as the way to wisdom in our social life and politics. By return to a secure foundation in the classical tradition of natural moral law, we can underwrite democracy and escape the quandary of "the masterless man" searching—perhaps unconsciously—for his "soul" or for a point of view for which he can live and die. A social ethic, firmly grounded in the natural moral law, will supply a dynamic standard to enable us to root out the modern malaise that says, with James Joyce, "Ours is an age of exhausted whoredom, groping for its God."

I believe the philosophical and ethical theory operating in these classical natural moral law theories to be basically mistaken. Therefore, I do not believe they can serve as adequate theoretical justifications for democracy or for anything else. Rather than criticize Lippmann explicitly, I will turn here to Lippmann's mentors, that is to say, I shall turn to the well-articulated and thoroughly developed theory of natural moral law that we find in Aquinas and in some contemporary Thomists. In this con-

* I should like to thank Professor Warren C. Hamill of St. Anselm's College for his helpful criticism of an earlier draft of this essay, though I should not like to suggest that he would agree with my criticisms of Aquinas.

nection, I shall pay particular attention to the arguments of Jacques Maritain and F. C. Copleston.[1]

It is important to note that I am not contending it is unintelligible to speak in some vague and unanalyzed sense of a natural good or goods that men generally incline toward.[2] I am only contending here that the scholastic, philosophical theory about natural law is in some basic respects unsatisfactory and, in the last analysis, unintelligible. I neither assert nor deny there are some basic moral evaluations common to the human animal. I should think that there are some, but the problem is too amorphous to be settled as yet. We need first a detailed analysis of what is meant by the terms, 'common good,' 'pan-human good' or 'basic moral evaluations,' and we need a thorough comparative anthropological investigation of what moral appraisals are actually made in radically different cultures. To take a stand pro or con, prior to such investigations, is unreasonable. I shall try here to fairly state and criticize the Thomistic theory of natural moral law.

I shall do this in the following way. In I, I shall make some remarks about what has been taken by the Thomists to be the proper setting for an adequate statement of the natural moral law theory. Then in II and III, I shall turn to the epistemic side of Thomistic ethical theory. In II, I state and evaluate Maritain's conception of "knowledge through inclination" and in III, contrast Thomas' ethical theory with theological voluntarism and criticize the Thomistic concept of something being self-evident in itself. In IV, I shall elucidate what Aquinas means by 'natural moral law' and contrast it with his other conceptions of law. In V, I shall state and then critically comment on the primary and secondary precepts of the natural moral law. In VI, I shall first discuss two standard difficulties with the natural law theory and then turn to two less frequently voiced, but more radical criticisms, that — to my mind — take us to the heart of the matter. Finally, I shall turn in VII and VIII to some puzzles about morality and teleology that might, in the light of my arguments in VI, prove worrisome.

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1. The basic texts involved are ST. THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Qq. 90-108; and SUMMA CONTRA GENTILES, Book III; Copleston's major treatment occurs in F. C. COPLESTON, AQUINAS, ch. V (Baltimore, 1955). For Jacques Maritain's most recent extended examination, see his MAN AND THE STATE (Chicago, 1951); THE RANGE OF REASON (New York, 1951); and *Natural Law and Moral Law,* in MORAL PRINCIPLES OF ACTION 62-76 (ed. by R. N. Anshem, New York, 1952). I have also drawn from some unpublished lectures given by Maritain at the University of Toronto in 1952. For a brief but excellent summation of Aquinas' view see Clifford G. Kossel, S. J., *The Moral View of Thomas Aquinas,* ENCYCLOPEDIA OF MORALS 11-23 (ed. by V. Ferm, New York, 1956).
2. The Oxford moralist, P. H. Nowell-Smith, makes an analysis of natural good that seems to me a step in the right direction. P. H. NOWELL-SMITH, ETHICS 171-82 (Baltimore, 1954). Note also my remarks at the end of my essay, *Reason and Morality,* 28 JOURNAL OF HIGHER EDUCATION 271-275 (1957).

I

Aquinas and contemporary Thomists like Maritain and Copleston give a large place to reason in their Christian ethical theory. They argue that if man doubts God's revealed Word, he can by the use of his reason come to know that God exists and that there are certain natural moral laws carrying obligations. By his reason alone, man can know certain natural goods. Aquinas' approach here bears the stamp of Aristotle's "commonsensical philosophy of ethics."

Though "metaphysical ethics" is now out of fashion in most quarters, Aquinas' theory has no plausibility at all apart from his conception of the nature of the universe.[3] In evaluating Aquinas' ethics we must keep constantly in mind his physics and cosmology. As Copleston remarks, Aquinas "sees the moral life in the general setting of the providential government of creatures" (p. 212), that is to say, Aquinas, like Aristotle, thinks the universe is purposive. It has a destiny and a rationale. The universe is not just some vast machine or conglomeration of atoms swirling in the void. The end of all activities in nature, says Aquinas, is God. In medieval physics, it is believed that all natural motions are just so many attempts to reach the changeless. Sublunar substances seek re-establishment in their proper places. Celestial motions cannot falter; they return upon themselves in perfect circles. Nevertheless, they are still motions. Only God is absolutely motionless and changeless. All motions and all things try to attain God, the motionless or changeless Being. We know that knowledge of and union with God is man's highest good; all other goods are finally instrumental to that good. But as Sisyphus sticks to his job with his stone, we ineluctably quest for that highest good. We know God exists, but we contingent, changing creatures never obtain God or knowledge of His essence in this life. But, unlike Sisyphus, we mortals have a surcease from striving, for after death there is a complete apprehension of God in His very essence.

Maritain emphasizes that conceptions of the natural moral law cannot be secularized, as in Grotius or Paine, without cutting out their very heart. The natural moral law theory only makes sense in terms of an acceptance of medieval physics and cosmology. If we give up the view that the universe is purposive and that all motions are just so many attempts to reach the changeless, we must give up natural moral law theories. One might say, as a criticism of the Thomistic doctrine of natural moral law, that since medie-

3. Kossel remarks: "The moral science of Aquinas is deeply rooted in metaphysics and theology." Kossell, *op. cit. supra,* note 1 at 12.

val physics is false then it follows that natural moral law theory must be false. While agreeing with this criticism, I think it is too short and too easy a way out to carry complete conviction. Contemporary Thomists would like to say that somehow the medieval view of cosmology or metaphysics is distinct from physics, and though the physics is false, the cosmology is still true. This seems to me just an evasion. If the word 'cosmology' means anything at all, it seems only to denote bad armchair physics. The so-called disciplines of cosmology and metaphysics have made no progress in discovering the categorial features of the world. This is so partly because of the very unsettled and indefinite signification of the words 'cosmology' and 'metaphysics.' In such a situation, it seems to me quite unrealistic to think we can use such disciplines as a basis for anything very substantial.[4] In this connection, it might be noted, incidentally, that Copleston, in his recent book, *Contemporary Philosophy,* is extremely cautious in his claims for metaphysics.[5] He rightly criticizes many things in contemporary and analytic philosophy, but in the process, he seems to have been bitten by the empiricists' bug! I shall not, however, rest my argument on this general blast against speculative philosophy though I should like to remark that my contention does not turn on a logical positivist rejection of metaphysics as nonsense. There may be, as Peirce suggests, both good and bad metaphysics and metaphysical methods.

II

Leaving aside all talk about the adequacy or inadequacy of metaphysics, let us look directly at Aquinas' moral philosophy. Aquinas believed that the good is somehow the normal. It is found by observation; that is to say, it is to be discovered by studying man's inclinations and reflecting on them. It is to be seen by apprehending what life really is. It is important to note, however, that this is an odd kind of "seeing" or "apprehending." As Maritain makes perfectly clear, it is a direct, immediate, nonconceptual "knowing through inclination" or "knowledge through connaturality."[6] And it is important to remember here that Maritain is not just trying to urge a view of his own but is also trying to elucidate what Aquinas really meant when he said we have knowledge of the natural moral law.

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4. Sidney Hook's critique of Thomism on this point seems to me essentially correct. See Sidney Hook, *Scientific Knowledge and Philosophical Knowledge,* 24 PARTISAN REVIEW 215-34 (1957).
5. See particularly ch. V and XII.
6. See JACQUES MARITAIN, THE RANGE OF REASON, ch. III (New York, 1952). See also his contribution, *Natural Law and Moral Law,* in MORAL PRINCIPLES OF ACTION (ed. by R. N. Anshem, New York, 1952).

Let us look a bit more carefully at this doctrine, for it is, according to Maritain, central to the Thomistic theory of natural moral law. Unfortunately, as Maritain also emphasizes, it is an extremely obscure doctrine. This so-called "knowledge through inclination" seems unlike what we ordinarily call "knowledge." It seems more like a feeling or an attitude. I am at a loss here to find an intelligible use for "knowledge," and I am far from sure that we can see clearly from Maritain's account exactly what it is that he wishes to say. (Here he could use a few lessons from G. E. Moore.) So in setting forth this aspect of Maritain's doctrine, I will be forced to use quotations liberally.

We discover first that knowledge through inclination is entirely nonrational and nonconceptual, even though produced in the intellect.[7] It is important, according to Maritain, for two reasons: 1) it "obliges us to realize in a deeper manner the analogous character of the concept of knowledge" and 2) it is important because of the role it plays in our knowledge of human existence.[8] It is obviously not a deductive kind of knowledge, and it is not knowledge through sense experience or speculative knowledge through "intellectual intuition."[9] Maritain remarks: "the intellect is at play not alone, but together with affective inclinations and the dispositions of the will, *and is guided and directed by them.*"[10] It is knowledge expressing the inner propensities of our being. It may be "incapable of giving account of itself, or of being translated into words."[11] We find it occurring in mystical experience and in "poetic knowledge," but the best paradigm for it is in moral knowledge. For Aquinas, our philosophically unmediated moral experience is the prime example of knowledge through inclination. In a very puzzling passage, Maritain remarks of Aquinas:

> It is through connaturality that moral consciousness attains a kind of knowing — *inexpressible in words and notions* — of the deepest dispositions — longings, fears, hopes or despairs, primeval loves and options — involved in the night of the subjectivity.[12]

Maritain does not deny that the facts are relevant to moral appraisal, but he adds that the moral agent must take into account "secret elements of evaluation which depend on what *he* is, and which are known to him through

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7. MARITAIN, THE RANGE OF REASON 22 (New York, 1952).
8. *Ibid.*
9. *Id.* at 29.
10. *Id.* at 23 (italics mine).
11. *Ibid.*
12. *Id.* at 26 (italics mine).

inclination, through his own actual propensities. . . ."[13] Moral judgments which express the natural moral law are not known through any "conceptual, discursive, rational exercise of reason."[14] Instead, through inclination we grasp that what is in line with pervasive human desires and wants is good, and what conflicts with that is bad. Moral philosophy does not discover the moral law, though (in some unspecified sense) it critically analyzes and elucidates moral standards.[15] Objective moral standards (ultimately the natural moral law) are known immediately through inclination.

In this murky doctrine of "knowledge through inclination" there is (so far as I can understand it) a good bit that is true as well as a good bit that is false. I shall first remark on what seems to me true in the theory and then I shall turn to what I take to be wrong with Maritain's theory.

First, Maritain is right in claiming that the concept of knowledge has an analogous character, that is to say, the word "knowledge" gets used in several different but not unrelated ways for several different purposes. My only question here is whether Maritain has either elucidated one of its many common uses or clearly stipulated a new use. Secondly, Maritain is also right (following Aristotle) in regarding moral knowledge as a kind of practical knowledge and in claiming that moral philosophy cannot by itself supply standards of moral appraisal. Surely, if a man had never experienced pain, remorse, deprivation, desire and the like, moral distinctions could have no meaning for him. A completely unmoved spectator of the actual would and could make no moral judgments or reflective moral appraisals. Furthermore, moral appraisals are practical in the sense that they are to guide action and alter behavior and not just to describe a state of affairs. But this claim has been clearly explicated from within an essentially empiricist point of view without any of Maritain's obscure constructions.[16]

Let us now consider difficulties in Maritain's conception of "knowledge through inclination." First, the work of philosophical analysts like Ryle and Wittgenstein makes it questionable whether one can sensibly speak of a kind of knowing "inexpressible in words and notions." To call something that cannot be conceptualized or expressed "knowledge" seems like an early retreat into a kind of obscurity that makes philosophical appraisal impossible. How can we, if we doubt there is really such a kind of knowing, rationally resolve this doubt? Or, even more basically, what is it that Maritain is claim-

13. *Ibid.*
14. *Id.* at 23.
15. *Id.* at 28.
16. Philip Blair Rice has recently developed a renovated ethical naturalism in which this is one of the cornerstones of his philosophy. See PHILIP B. RICE, ON THE KNOWLEDGE OF GOOD AND EVIL (New York, 1955); and P. H. NOWELL-SMITH, ETHICS (Baltimore, 1954).

ing? It is a truism to say that in philosophical *appraisal* we must necessarily deal with what is expressible.

My second critical point about his doctrine of knowledge through inclination is connected with the last part of my second positive point. In effect, Maritain sets forth a naturalistic theory at the foundation of natural moral law:[17] what man strives for is good and what man avoids is bad. But at the same time he claims that only a supernatural sanction will do for morality and will avoid the chaos of our time. Yet, on his doctrine of knowledge through inclination and on his natural moral law theory, the man in moral perplexity needs only to observe the desires and wishes of his fellow man and by seeing what they generally seek he will know what is good and what he ought to do. It is very difficult to see how this doctrine differs very much from that of Russell (in his *Human Society in Ethics and Politics*) and Hume where they claim that reason is and ought to be the slave of the passions and that the fundamental data for and basis of ethics are the emotions, passions, and impulses. The Thomistic label "knowledge through inclination" only serves to label the baby "legitimate" in the eyes of the supernaturalists. And to call attention to the distinction between *jus gentium* and *jus naturale* is not at all to the point here, for it is claimed that by noting the actual pervasive desires and wants of the human animal we can at least dimly come to know the natural moral law.

III

Maritain, however, would not wish to accept this reduction — there are other elements in his theory that run counter to that and may provide him with a way out. For Aquinas and for Maritain good is not simply what God wills, as the theological voluntarists claim. God's intellect is logically prior to His will, according to St. Thomas. He wills the good because it is good. Aquinas' medieval opponents, Scotus and Ockham, hold different views. Scotus claims that God's will is prior to His intellect. In understanding human good, we must look to what man wills or strives for. William of Ockham goes all the way with this theological voluntarism. Something is good simply because God wills it. Goodness is in the will and not in any order of being or reality. What is right or wrong morally is not subject to rational proof as in Aquinas. Many people feel that this voluntarist view leads logically to moral skepticism.[18] It can be argued plausibly that on the one hand volun-

17. See, for example, William Frankena, *Ethical Naturalism Renovated,* 10 THE REVIEW OF METAPHYSICS 457-73 (1957).
18. See E. W. HALL, MODERN SCIENCE AND HUMAN VALUES 289 (Princeton, 1956).

tarism leads to Luther, Kierkegaard, and Barth, and on the other, to Hume's and Russell's view that reason is and ought to be the slave of the passions, the basic difference being that the former are supernaturalists and the latter are not. But for Aquinas, as for the Stoics, good is somehow in the very nature of things. The highest goodness is an attribute of God's very essence. This essence we know only after death. But we know now *that* God is (as opposed to knowing *what* He is); and we apprehend the natural moral law as the part of the eternal law that God allows us to understand with our reason. Our knowledge of it is not precise, but we genuinely know the unchangeable and eternal good, though we must remember this is "knowledge through inclination." This natural knowledge of good and evil is far from clear, but we do have it; and it is well to remember that this practical knowledge is claimed to be certain though cognitively unclear knowledge. By this, Aquinas (as well as Maritain) means that the natural moral law is self-evident in itself though it may not be self-evident to us.

We must, however, look into this peculiar claim of self-evidence. The uses of this word are many and varied. It is tempting to take an empiricist and pragmatist line and argue that all talk of "self-evidence" is useless or absurd because "self-evident truths" are tautological and existential statements are all less than certain. I do not — at least not here — want to make that strong claim, but only to argue that talk of "self-evidence in itself," as an idea that corresponds to the idea of the Divine Craftsman, does not make for clarity. On such a theory, statements can be self-evident in themselves quite apart from any human knowledge of them. Maritain emphasizes that it is God's Reason, not man's reason, that is the source of the natural moral law. For its authority natural moral law depends solely on "Divine Subsisting Reason." The cardinal error of Grotius and the *philosophes* (old and new) is to take natural law to be a "law of human nature" as deciphered by human reason. To do so is to make the egregious error of substituting human authority for Divine Authority, human reason for Divine Reason, as the standard for moral good. Natural moral laws are indeed rationally self-evident, but they are self-evident to God and not necessarily to man. Even assuming we can make sense of all this talk, such a conception of self-evidence still does not help us out at all, for how do we know, as moral agents faced with practical problems, which of the many moral imperatives are the self-evident laws of God? The important thing is to have something self-evident *to us,* or at least some reliable knowledge of God's natural moral law. With a natural moral theory we can, supposedly, bypass the appeal to faith made by neo-orthodoxy and by Christian existentialism. In Thomistic ethics (old and new) we have held out to us the promise of a rational ethic and rational decision procedure for

what we ought to do in particular situations; but in reality, since human reason is not adequate to decide what is a natural moral law or what is or is not self-evident in such a situation, we are no better off with such a theory than with the severest fideism.

"Natural moral laws are self-evident in themselves" and "Natural moral laws are known through inclination" are two exceedingly obscure statements that raise more problems than they solve. The doctrines they express hardly function as aids to a rational solution of the problems connected with our knowledge of good and evil.

IV

Now let us see a little more specifically what Aquinas and his contemporary followers mean by "natural moral law." Perhaps here we will at least discover how to start out. The natural moral law is distinct from the laws of nature in the scientific sense of "law of nature." A law of nature is a hypothesis. It functions predictively, though there is no need to say this is all the laws of nature do. But they must at least do this. If something is a law of nature we must be able to infer from it "If so and so is done, such and such will happen." Natural moral law, on the other hand, is normative and at the same time somehow part of the very structure of the universe. It not only says what is the case, but it says what ought to be the case.

Natural moral law, for Aquinas, is not merely what is on the books. This he calls positive law. But he argues that even positive law is genuinely law only when it does not conflict with natural moral law. Law, for Aquinas, is essentially a normative or a moral notion. He defines a law as "an ordinance of reason for the common good, promulgated, and emanating from him who has care of the community." Certain elements should be noted in his definition. 1) An ordinance is a precept, or a rule, saying so and so must or should be done. It is meant to guide conduct and not just tell us what has been done, is being done, and will be done; rather it tells us that something *ought* to be done. 2) It is a rational precept, not just a command. Yet it carries an obligatory or imperative force. 3) It is for the general good or happiness of the community. It is not just any command, and it is not just for some partial good. 4) It must come from a legitimate authority. 5) It must be publicly stated or proclaimed.

There are four basic kinds of law for Aquinas (natural moral law is, of course, one of these). First, there is the Eternal Law. The Eternal Law is God's law or blueprint for the universe. It is law governed by Divine Reason. It emanates from God as Sovereign and is promulgated by Him for the good of His Creation in several ways. The natural moral law is that part of the

Eternal Law that man can apprehend with his unaided reason. It is not a creation of man's reason, but emanates from God's reason. Man's reason is quite passive with respect to the natural law. Man does not alter it or change it. Man is not the measure of all things. Rather, God is the measure of all that is and of all that is good. Mankind can apprehend this good, but he does not create or alter it, even by his collective decisions. (It is crucial to recall, as I pointed out in II, the nature of this "apprehension." It consists in what Maritain called "knowledge through inclination.") This natural moral law is the second kind of law. Divine Law is that part of the Eternal Law which God makes known through Divine Revelation and the like. It is not grasped by man's reason but is given to man as an Eternal Truth of Divine Revelation. The fourth kind of law is the human law. The particular precepts for the common good devised or fashioned by human reason are called human laws. These laws are not just given to us but they are the expression of human reason and decision. Human law, however, while not derived from natural moral law must be compatible with it. If a human ordinance conflicts with the natural moral law, it is a perversion of the natural moral law. One of the natural laws states that man must seek to preserve his own being. If we had a particular rule that said "All students who flunk from college must commit suicide," it could not be a human law, for it is incompatible with the natural law that "We ought to preserve our lives." A human law (to use Maritain's example) that is compatible with the natural moral law is the law that "people must stop at red lights — go at green lights." This human law is completely conventional and relative. Yet it is important that we have such a convention and that it is compatible with the natural moral law.

We should not forget that all these laws are either moral laws or they are directives that must be in accordance with moral laws. They are, in their proper spheres of application, guides for conduct. The natural law, Divine Law, and Eternal Law are unalterable and eternal. They are basic moral truths that hold as truths irrespective of any feelings or emotions on our part. They are binding on our conscience and we have a duty to obey them whether we have favorable attitudes toward them or not. And the human animal can know with absolute certainty, according to the Thomists, that certain natural moral law precepts are true. Our "knowledge" here is not "discursive knowledge" but that strange, immediate, "nondiscursive knowledge" Maritain calls "knowledge through inclination."

When we read Aquinas himself, and do not reflect on the sense of "knowledge" relevant here, we are easily led to believe that a claim is being made that, in some plain sense of "knowledge," we have certain knowledge of some eternal moral truths. But, as I shall try to show in V and VI, if we take

"knowledge" in any of its ordinary senses it becomes exceedingly doubtful if we have any such knowledge of eternal moral truths. Faced with these difficulties it is natural to try to construe "knowledge" in a different way, as "knowledge through inclination," but then, as I have indicated, we end up by using the mark (token, sign-vehicle) "knowledge" in a very different way from the way we normally use it, while still keeping all the honorific features of "knowledge." We have, in short, made a *persuasive definition.* And when we actually keep in mind what is counting as "knowing moral laws" here, have we really a more objective claim about the foundations of morality than we have in Hume or Russell? Indeed we have a claim that sounds more objective than Hume's or Russell's, but when we consider the special way we "know" these laws (and this is our sole evidence for them) is it really any more objective than these "subjective views" that Thomists so frequently deplore?

V

Let us now consider the actual precepts of the natural moral law. "Good is to be done and gone after, and evil is to be avoided" is the primary natural moral law from which all others are derived, and it is the first principle of practical reason.[19] Aquinas and his contemporary followers insist that all the other natural laws are based on this vacuous first principle of natural moral law. This, of course, is a very weak base indeed. For, unless we assign some denotation to the word "good," as used above, this first principle of the natural moral law would be completely compatible with the most extreme kind of relativism. But from the first principle of the natural moral law we cannot determine what the denotata or criteria of application of "good" will be. All we can conclude from this primary principle is that if something is good we have to seek it. It does not tell us what to seek.[20] (Is Aquinas' statement here really anything more than a bit of linguistic information, disguised because it is stated in the material mode? Is Aquinas, here, really saying anything more than "If we call something 'good' then we must also say that it is something that is to be sought, everything else being equal"? But this informs us about our linguistic behavior; it hardly gives us the foundation of an objective rational ethic that will save us from the "dark night of subjectivity.")

Our knowledge of the other natural moral laws is much less certain. We know them (as Maritain most emphatically argues) immediately and non-

19. Practical reason is reason that is concerned with what is to be done. See John Ladd, *Reason and Practice,* in THE RETURN TO REASON (ed. by John Wild, New York, 1951).
20. COPLESTON, AQUINAS 214-5 (Baltimore, 1955).

conceptually by natural inclination. They are the ends we necessarily seek in virtue of our very humanity. We might list the ones Aquinas mentions, stating them clearly as normatives, so as to bring out their moral force.

1. Life ought to be preserved.
2. Man ought to propagate his kind.
3. Children ought to be educated.
4. Men ought to know the truth about God.
5. Man ought to live in society.
6. Ignorance ought to be avoided.
7. Offense ought not to be given unnecessarily.

These are all supposedly based, in some manner, on man's natural inclinations. It is claimed they are based on human nature. However, according to Aquinas, not all our inclinations are natural inclinations, for some can be "corrupted by vicious habits," and again the natural knowledge of good in them (people with vicious habits) is "darkened by passions and habits of sin." Aquinas is contending that there are some cross-cultural or pan-human characteristics that we might use in constructing a definition of "human nature." Like Plato, Aquinas is claiming that man is distinguished from the other animals by his ability to reason. If man examines his natural inclinations, he will discover that there are certain unalterable pan-human natural moral laws. Copleston states Aquinas' argument here in the following manner: "For although man cannot read off, as it were, eternal law in God's Mind, he can discern the fundamental tendencies and needs of his nature, and by reflecting on them he can come to know the natural moral law." (p. 213) Copleston continues: "Every man possesses also the light of reason, whereby he can reflect on these fundamental inclinations of his nature and promulgate to himself the natural moral law. . . ." (p. 213) Purely natural man is not left in ignorance of the eternal law which is the ultimate rule of all conduct. The natural law part of the eternal law is not simply a Divine Fiat. Rather, we moral agents recognize its inherent rationally binding force. Though the first principle of natural law only tells us that good is to be done and evil is to be avoided, we give concrete content or non-zero denotation to our concept of good and evil "by examining the fundamental natural tendencies or inclinations of man." (p. 215) By examining man's nature and natural inclinations one can discern the good for man in the natural order.

Now, St. Thomas does distinguish between primary and secondary precepts of the natural moral law. The secondary precepts are not relative. But they do have only a limited contextual application, that is, they apply only to certain classes of acts. As Copleston remarks, what Aquinas means in say-

ing that they can be changed is that such natural moral laws are altered when the circumstances of the act may be such that it no longer falls into the class of actions prohibited by the precept. Copleston uses the following example: "We can say in general that if someone entrusts his property to us for safekeeping and asks for it back, we ought to return it. No sensible man would say that if someone entrusts us with a knife or a revolver and asks for it back when he is in a state of homicidal mania, we are obliged to return it." (p. 219) Copleston then generalizes: "In its general form, however, the precept remains valid. We can say with truth that Aquinas believed in a set of unalterable moral precepts." (p. 219)

Maritain, though he makes a great show of wishing to square Aquinas' theory with the facts of moral relativity, does not seem to go beyond this above position in any significant manner. For Maritain there are certain fundamental "dynamic schemes" of natural moral law that are unalterable and are universal. In particular contexts they are subject to an "indeterminate expression." In fact, the same natural moral law can have different and distinct "indeterminate expressions," although they all must be compatible with the more general rule. The general rule is not changed. Unfortunately, the only examples Maritain gives us of culturally relative moral rules are rules of human law or positive law. However, no one questions their relativity or conventionality; what we want to know is what he would say about the actual and anthropologically confirmed exceptions to all seven of Aquinas' natural moral laws listed above. (Since this could conceivably be read as an admission on my part that we can derive an "ought" from an "is," it is more precise — though more cumbersome — to say: "Aquinas' claim that natural moral laws are expressions of the natural inclinations of all men conflicts with the anthropological claim that these are not always and everywhere expressions of natural inclinations.") No doubt he would say such inclinations, when they occur, are perverted or primitive. But this begs the question, for it is only by at least an implicit reference to a *moral standard* that we can determine which rules are "perverted," "primitive," or "corrupt." The natural moral law theorist, however, is supposedly building a normative ethic on man's actual natural inclinations, rather than on the inclinations of certain men called "good or non-perverted men." If the natural moral law theorist is to be consistent, he cannot simply proclaim a standard of moral appraisal and then say that all those who do not act in accordance with it are perverted or evil. Instead, the standard is supposed to come somehow from the very feelings and inclinations of all men.

VI

The above are only some of the puzzles engendered by the Thomistic theory. As clear as Aquinas' kind of theory may seem the first time around, it becomes far more difficult to comprehend after a closer look. Its taxonomic structure hides fundamental confusions, though on Aquinas' behalf it must be said that they were confusions which might naturally arise in his cultural context.

In pointing up these difficulties, I shall first turn to two standard difficulties that have been traditional stumbling blocks for students of natural moral law theories. I do not think these are the most basic difficulties, but I do think these standard difficulties are genuine and need looking into. I doubt that they can be answered satisfactorily from within the Thomistic position of natural moral law. I shall examine them first and then turn to what I regard to be the two more philosophically interesting and more basic difficulties in the natural moral law theory.

The first standard difficulty emerges when we compare the natural moral law theory with some of the things now being said in social psychology. It is frequently said that *from the point of view of science,* there is no such thing as an essential human nature which makes a man a man. The concept of human nature is a rather vague cultural concept; it is not a scientific one.[21] While I think this criticism is surely debatable, it does raise a problem for the natural moral law theory since it is clear that the statement, "there is an essential human nature," is not the obvious, self-evidently true statement Aquinas and his contemporary followers take it to be.

The second standard criticism is a stronger one. It appeals to the facts of cultural relativity. If we go to actual cultures and study them, we find that all of the natural moral laws listed above by Aquinas are broken somewhere by some people. If it is answered, "Well, most cultures obey the above rules," two replies can be made.

First, it can be said that the reply in itself assumes that what most people find natural and better, is natural and better. To assume this, however, is to presuppose the value of a naive kind of democracy; we determine what is good by counting noses or by a Gallup Poll. Moral issues become vote issues. Aquinas, of course, would not wish to say they are "vote issues." Moreover,

21. Otto Klinberg, Social Philosophy (New York, 1940). On the other hand, A. H. Maslow and Weston LaBarre, along with others, have spoken in a supposedly scientific sense of "a human nature." See A. H. Maslow, Motivation and Personality (New York, 1954), and Weston LaBarre, The Human Animal (Chicago, 1954).

why must we accept this "democratic" standard as our ultimate standard? If we say that people simply do accept it, we not only make a statement that is anthropologically false, but we also go in a circle. We use our democratic standard to establish our democratic standard. Secondly, it is the case that for the natural moral laws which are fairly concrete, there is not this majority agreement. If we turn to the more general natural moral laws, we find that they are so vague that they hide all sorts of differences that both parties would regard as crucial. As anthropologists, like Ralph Linton, have pointed out, all cultures have a concept of murder. But if we try to give the concept of murder some specific content which would cover its use in all cultures, we run into difficulty. While all cultures agree that murder is wrong, this is completely compatible with the Eskimos' killing members of their family if they do not feel they can make it through the winter; or with infanticide in Polynesia and Greece; or with the old Scandinavian habit of clubbing one's older ancestors to death so that they may go to Valhalla. But for these people this killing is not murder which is by implicit definition wrong. Just what will count as murder in the given culture varies radically. To say that all cultures have a concept of murder tends to obscure basic radical moral differences. To suggest that these are just indeterminate expressions of the basic moral law blurs a crucial way in which our judgments of good and evil are relative.[22]

There are two more basic difficulties with Thomistic natural moral law theory that I would like to consider now. First, even if it is the case (contrary to what was said above) that there is basic cross-cultural universal acceptance of certain fundamental moral beliefs and/or attitudes, it would *not* follow that the Thomistic natural moral law ethic had been established. This agreement could be explained at least as adequately by a theological voluntarism, the kind of meta-ethic offered by Russell and Hume, or by a Deweyian kind of naturalism. Russell, for example, would not talk of an apprehension of natural moral law emanating from God. He could explain the same facts by saying that those common moral ideals are expressions of commonly held attitudes or commonly felt emotions. They express the common decisions we men make in virtue of our common interests and similar make-up. Recalling that Aquinas and Maritain must invoke the strange doctrine of "knowledge through inclination," it might well be argued that Russell's kind of theory is to be preferred because it is simpler. Applying Ockham's razor, we might naturally remark that Aquinas' "hypothesis" is one we can well dispense with.

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22. This point has been made very forcibly both for morals and for art criticism by George Boas. See George Boas, *Cultural Relativism and Standards,* in VISION AND ACTION 112-132 (ed. by Sidney Ratner, Rutgers, 1953).

The same point can be put differently. Because we have (if we have) a common human nature and in accordance with it make certain common moral appraisals, it does not follow that there is a natural moral law in the Thomist's sense. Even if it is true "that all men share some very vague ideas about the good for man, precisely because they are men who possess certain natural tendencies and inclinations in common," this does not serve as a proof that these shared ethical ideals are *God-given* rather than man-made. It does not even serve to make such a belief plausible.[23] One can accept some panhuman agreement about what man's good is without being committed to Aquinas' moral philosophy. As a matter of fact, Erich Fromm makes a similar argument from a naturalistic and neo-Freudian point of view.[24]

It must be added that this form of "natural moral law" based on universally shared attitudes is not enough for Aquinas, for it does not establish that they are self-evident, unchanging moral laws. Thomists need a stronger basis than the unity of human nature to establish their natural moral law theory. If there is no unity or common human nature, the Thomists are clearly wrong; but if there is a unity or common nature to the human animal, it does not follow that the Thomists are right.

I suggest, finally, that the whole theory rests on the confusion between *what ought to be* and *what is*. As Hume made us realize, the statement, "Man ought not to steal," is quite different from the statement, "Man does steal."[25] Men steal when they ought not. Sentences with an "ought" in them belong to a different *logical type* than sentences with an "is" in them. From factual statements alone, including statements of fact about human nature, we cannot deduce or derive any "ought" statement whatsoever. Values and facts are distinct, and Aquinas and his followers are not clear about this distinction, precisely because they looked upon nature as purposive, as having some kind of moral end in itself. This conception of a purposive nature is not only false but it also serves to obfuscate the basic distinction between facts and values that is so essential if we are to understand the nature of moral argument and decision.[26]

23. See in this context A. I. Melden and W. K. Frankena's contributions to the symposium *The Concept of Universal Human Rights,* in *Science, Language and Human Rights,* 1 The American Philosophical Association 167-189 (1952).

24. Erich Fromm, Man for Himself (New York, 1947).

25. Hume's celebrated passage occurs in Book III, Part I, Section 1 of his A Treatise of Human Nature.

26. In a brilliant and readable interpretation of the history of ideas, Professor E. W. Hall has indicated how value elements have been gradually taken out of science and how in moral reflection we have become progressively clearer about the distinction between "ought" statements and "is" statements. He also indicates how this raises philosophical problems about the validation of moral and evaluative statements. I might add that I am indebted to Professor Hall for a general kind of framework in which much of my argument develops. See E. W. Hall, Modern Science and Human Values (Princeton, 1956).

VII

Now it may be felt that the last two sentences in VI are sweeping and wholly unjustified. Where have I established that nature is not purposive and where have I shown that there are no "moral facts" in a purposive nature? The basic issue, it may be felt, is simply passed over.

I do not believe this to be true; that is to say, I do not believe that my case against Aquinas' conception of the natural moral law depends on my rejection of Aquinas' metaphysics or cosmology. Indeed his and Aristotle's conception of a purposive nature seems to me at best false and at worst unintelligible, but my argument against the natural moral law theory does not turn on that belief.

It is possible, however, both to make strong arguments against this metaphysical view and to show that even if these Thomistic metaphysical claims were true, the essential puzzle about the "is" and the "ought" would remain. As Bréhier, Koyré, and others have pointed out, with the arrival of Newtonian physics and Cartesian philosophy there disappeared from the scientific outlook all consideration of purpose and value.[27] An experimental psychologist like Tolman or a biologist may speak of "purposive behavior," but in Aquinas or Aristotle "purposive" and "purpose" have a very different meaning. To ask "What is Jones' purpose?" is to ask about Jones' motives or intentions (or their behavioral correlations). Now it may be the case that the distinctively philosophical parts of Descartes are a great mistake, but it will hardly be claimed that Newtonian mechanics is a mistake, though even here we must in retrospect distinguish between Newton's physics and the quasi-theological and metaphysical conceptions he shares with Henry More and Raphson. "A new and fruitful scientific conception," Toulmin remarks, "is often hatched from an egg of a very different sort, and for some time fragments of its original shell may (so to say) adhere to its plumage."[28] Galileo may well have been a Platonist, but we can accept Galileo's contributions to physics without embracing his Platonism, just as we might accept Berkeley's theory of knowledge without assenting to his views about the value of tar water; Newton, in later editions of his *Principia,* urged certain orthodox theological views, but Newton's physical theory is logically independent of his metaphysical and theological beliefs. No physicist today would dream of arguing that Aristotelian dynamics ought to replace modern physical theory. Aristotelian physical theory, *qua* physical theory, is only of historical interest.

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27. E. Bréhier, 2 Histoire de la Philosophie, fasc. 1, 95 (Paris, 1929) and A. Koyré, *Galileo and Plato,* 4 Journal of the History of Ideas 400 (1943).
28. Stephen Toulmin, 67 Philosophical Review 572 (1958).

And modern physical theory, as Hall has argued convincingly in his *Modern Science and Human Values,* does not treat nature as good or bad. Nature is not regarded as purposive, and values are not taken to be some very special and mysterious facts of nature.

I am perfectly well aware that Thomists would claim that such statements as "Nature is Purposive" and "There is a Necessary Being or an all-good God" are metaphysical statements and they are supported in a different way from scientific ones. But I do not believe (as I said in I) that this metaphysical position has been made intelligible, much less established as true. The basic difficulties about purpose or design in nature seem to me to go back at least to Hume and Kant; and I agree (and I believe most non-Scholastic philosophers would agree) with Broad's verdict: "I have seen nothing in the writings of those who have tried to rehabilitate the argument which effectively rebuts their [Hume's and Kant's] adverse verdict." [29] It is true that certain defensive moves have been made against Kant and Hume, though it seems to me that Hepburn, Anderson, O'Connor, Smart, Nagel, Watts, and Edwards have recently made decisive arguments against these Thomistic metaphysical claims.[30]

I can only briefly indicate one line of argument against claiming that there is (in the relevant sense) purpose in nature. Suppose we grant that in the parts of the universe we have observed there is truly a marvelous adaptation of means to ends. From the movements in our solar system to the return of the homing pigeon and the pollination mechanisms of plants, things proceed in an amazingly orderly way. But we cannot conclude from this that the universe has in the appropriate sense either a purpose or a Designer. (It could not, of course, fail to have some design in the sense of having some structure.)[31] Even *if* it is the case that all processes directed by intelligent creatures involve adaptation of means to ends, this does not entail that all adaptation of means to ends is the product of intelligence. What reason have we to believe that those marvelous adaptations, which are not independently known to be deliberately designed, have a design and designer or a purpose? How could we test whether the human eye, the solar system, or ants were so de-

29. C. D. Broad, Religion, Philosophy and Psychical Research 190 (New York, 1953).
30. Ronald Hepburn, Christianity and Paradox, ch. 9 and 10 (London, 1958); John Anderson, *Design,* 13 Australasian Journal of Philosophy 241-256 (1935); D. J. O-Connor, An Introduction to the Philosophy of Education 115-126 (New York, 1957); J. C. C. Smart, *The Existence of God,* in New Essays in Philosophical Theology 28-46 (ed. by A. Flew and A. Macintyre); Ernest Nagel, Sovereign Reason 17-35 (Glencoe, Illinois, 1954); G. S. Watts, *The Thomistic Proofs of Theism,* 35 Australasian Journal of Philosophy 30-46 (1957); Paul Edwards, *The Cosmological Argument,* in Rationalist Annual 63-77 (1959).
31. Leibniz, Discourse of Metaphysics.

signed? What would count as a failure here and what would count as a successful test? I do not believe there is or can be a test here. If someone claims he intuits it, others can and will, with equal legitimacy, claim they do not intuit it. The very meaning of "test" will then become otiose at this juncture.

To say we can legitimately use an analogical argument at this point also gives rise to insuperable difficulties. The human eye may be like a beautifully balanced machine or a work of art in certain respects, but it is like a vegetable or rock in others. Why should we pick one analogy rather than another? If we say because one more adequately illustrates one claim rather than another, then we can say: But what *independent* reason have you to believe that one claim — the design claim — is the correct claim? We must then leave analogy or make another analogy, to which the same objection could be made. And there seems to be no good reason why the design claim should be accepted as the correct claim. Furthermore, what does it mean to say, "The universe has a purpose," taking "the universe" either collectively or distributively? Presumably, if "the universe" is taken distributively, "the purpose of the universe" is equivalent to the sum of all the individual purposes. But how do we sum them? What does this look like? And even if we can sum them, do we not then supposedly have some overall purpose? What would it be like for the universe to fail to have a purpose? What would have to happen or not have to happen in order for us to recognize or fail to recognize that it is true or even in any degree probable that the universe has a purpose? If, in an attempt to avoid the above difficulties, "the universe" is taken collectively, then to discover purpose in the processes in the universe would not at all prove the universe as a whole has purpose. In either event, if "purpose" is being used analogously to "purpose" in "My purpose is to take the island" or in "Jet fighters have a purpose," then our uses of "purpose" must have a minimum of one distinctive property in common. But what is this property here? And if no common property is signified by "purpose," then "purpose" is surely being used equivocally.[32]

These arguments are not new and they are not at all exhaustive of all the moves that can be made by both sides. They are of necessity put with exceeding brevity; if I were to expand these arguments I would merely be going over what seem to me well-worn though decisive arguments that are essentially outgrowths of Hume's and Kant's arguments, though this is not to say that they have not been tailored to meet attempted rebuttals of Hume and Kant.

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32. Paul C. Hayner, *Analogical Predication*, 55 THE JOURNAL OF PHILOSOPHY 855-62 (1958).

VIII

This short argument and "appeal to authority" will no doubt seem unconvincing to some, but to try to say why metaphysical explanations of this type are unintelligible would involve another essay, if I were to do justice to the question. But for the sake of this discussion I will grant what I believe to be contrary to fact, namely, that "Necessary Being" and "final cause" have an intelligible use. Let us also assume for the sake of the discussion that sentences like "Nature is purposive," "Man and nature have a final end," and "Men were created to worship God" are true. My crucial point is: *Even if these sentences really can be used to make genuine statements that are in fact true, no normative or moral statements can be derived from them.*

Philosophers who deny that we can logically derive or base a moral claim on a metaphysical position will say, as William Dennes does:

> A system of metaphysics, if it were known to be the truth or the probable truth about the order of entities that constitute the universe, would of course be superbly instructive. But there is one thing it could not enable us to do logically or intelligibly, and that is to determine from what really is what really ought to be: to derive from judgments of fact, judgments of value. It could only be by taking the symbol "good" to mean precisely what it meant by "real," and nothing more than is meant by "real," that we could say that metaphysics, as a theoretic discipline, determines or demonstrates the nature of value. But then our statement, "what is metaphysically real, and only that, is good," would mean precisely what is meant by either one or other of the empty truisms: "Whatever is metaphysically real, and only that, is metaphysically real," or "whatever is good, and only that, is good." [33]

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33. William Dennes, *Knowledge and Values,* in SYMBOLS AND VALUES: AN INITIAL STUDY 606 (ed. by Lyman Bryson, New York, 1954). Father Gallagher has replied to Dennes on this point but I do not believe he obviates the basic difficulty advanced by Dennes about deriving a moral statement from a metaphysical statement. Gallagher says, with respect to the quotation from Dennes given in the text: ". . . a Scholastic would say that every actually existing thing (that which is real — *a res*) is good. Even the devil, insofar as he exists according to the creatural nature God gave him, is good." But the "is" in Gallagher's two sentences is not the "is" of identity but the "is" of predication. We can deny these two statements themselves without self-contradiction; and the last one is clearly a moral judgment, and the other would be if it were not a bit of indirect discourse. ("Every actually existing thing is good" is a moral utterance.) To say "Evil, as such, is a privation and that reality, as such, is good" is to make another moral judgment and not to indicate how we could set up a metaphysic as the basis or foundation of our moral norms, even if we can understand (as I do not) what "privation" as "a deflection from his [the Devil's] original reality, in the direction of nothingness" means. Gallagher is right in saying that *if* we accept his moral judgments quoted above as leading moral principles or as normative defining principles of natural moral law (functioning like the ground rules of chess) then " 'good' can mean precisely what is meant by 'real' "; but Dennes' point and my point is that in ordinary moral discourse there is no such rule of language and that to make one

Those who think they can discover what they ought to do from a discovery about "ultimate nature of reality" are tacitly assuming that what is metaphysically real or "ultimately real" ought to be done or ought to be. But it is not self-contradictory or even logically odd to say, "X is an ultimate reality whose nonexistence is inconceivable, but X ought not to be." What is ultimately real could be evil or it could be quite neutral. There is no rule of language which indicates an identity of meaning between what is real and what is good or obligatory. To make such a rule by linguistic fiat and to claim that such a linguistic fiat *ought* to be accepted because it gives us a clearer, more *adequate* foundation for morals is itself an expression of a value judgment; and if such a value judgment is made, we must for the sake of clarity give up the idea that we can derive a moral statement from purely metaphysical statements and/or metaphysical and empirical statements alone.

That many plain men infer "X is obligatory" from "God wills X," "X is in accord with our essential human nature," "X is of the true nature of Being" and the like, indicates they have tacitly, and perhaps even unconsciously (as in a Peirceian acritical inference) assumed "What God wills is obligatory," "What is in accord with our essential human nature is good," etc. But here these hidden premises are themselves moral judgments; the "is" in the above sentences is not the "is" of identity, and all these statements may be denied without self-contradiction.

Someone might still claim that I have not yet really met the Thomist or Aristotelian case. I have assumed a "metaphysical system" or a set of categories in which fact (including "metaphysical facts") and value are distinct, but, it might be urged, the Thomistic-Aristotelian system is denying just that, for some facts and values at least. When it is claimed that nature is purposive, there is just this conflation of fact and value. I find this claim obscure almost to the point of unintelligibility. It is the obfuscation I was complaining about at the end of VI. There seems to be no intelligible job for these words here. We cannot do the usual things with them and we do not know what new things to do except that in some exceedingly obscure way they indicate that some claim is being made about a more secure foundation for our morality.

But even *if* we can intelligibly indicate how the fact-value or evaluative-descriptive dichotomy does not apply to a statement like "Nature is purposive" and *even* if we can show that these "metaphysical realities" are at one and

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is in itself to make a value judgment and not to derive moral statements from metaphysical statements about reality. See Eugene Gallagher, *Comments*, in SYMBOLS AND VALUES: AN INITIAL STUDY 615 (ed. Lyman Bryson *et al.*, New York, 1954).

the same time facts and values, I still do not see how we can derive ordinary moral or evaluative conclusions from them.

I must explain my meaning here. Moral questions are practical questions. They occur when questions arise about what is to be done or whether what was done in the past was the thing to have done. Most paradigmatically, moral statements are used to guide conduct.[34]

We have a clear case of moral reasoning in Thucydides, *The Peloponnesian War*. (1.68 ff.) Sparta's allies come to Sparta to discuss the difficulties with Athens over Potidaea and Corcyra and to decide whether to break up the Delian confederacy and fight Athens. The question is clearly a question about what to do. Their interest in what was the case was limited to discovering those facts which would help them decide how to *act*. The Corinthians advised the Spartans: ". . . choose the right course, and endeavor not to let Peloponnese under your supremacy degenerate from the prestige that it enjoyed under that of your ancestors." Some Athenians, who happened to have been in Sparta, countered by bidding the Spartans "not to dissolve the treaty, or break your oaths, but to have our differences settled by arbitration according to our agreement." In weighing the considerations the majority of Spartans were for war, but their old king, Archidamus, urged peace. He warned them of their inferiority in ships and of Athens' invulnerability and advised them to "have a care that we do not bring deep disgrace and deep perplexity upon Peloponnese." He finally urged the Spartans to prepare for war but not to initiate aggression. But the Ephor Sthenelaidas (a politically astute rabble-rousing moralist) countered this and exhorted the Spartans to "Vote . . . for war, as the honor of Sparta demands, and neither allow the further aggrandizement of Athens, nor betray our allies to ruin, but with the gods let us advance against the aggressors." The Spartans considered these contentions and finally with their allies decided on war. The point here is not to deny that reasoning went on and that factual considerations were involved but to point out that all of this was instrumental to arriving at a decision.

Moral problems are problems of choice, and moral reasoning is practical reasoning about how we should act. Even when *we* say "The Spartans were clearly wrong in declaring war" we do not make a purely theoretical statement. Rather we are saying (in effect) that the Spartans ought to have acted in a certain fashion and we imply that if we had been similarly placed we would have heeded Archidamus and not declared war. Moral questions are, necessarily, questions concerning what to do. This is the basic sense in which

34. P. H. Nowell-Smith, Ethics 11-22, 95-104 (Baltimore, 1954); Kai Nielsen, *The Functions of Moral Discourse*, 7 Philosophical Quarterly 236-248 (1957); and *Speaking of Morals*, 2 The Centennial Review 414-44 (1958).

a moral judgment is prescriptive, directive, or normative.[35] We are only interested in what is the case to the extent that knowing what is the case is instrumental in helping us decide what to do.

With these remarks in mind, it should not be hard to see that no moral or evaluative statements follow from these so-called "fact-value statements" or from "fact-value statements" together with some plain empirical statements. If I, as a moral agent, discover that, in some peculiar way, the "fact-value" "The Universe is purposive," is true and that I, as a being in the universe, have a purpose or an end, it still does not follow that I have *ipso facto* resolved any moral perplexity by noting how it is that I behave. The discovery that "teleological explanations" rather than "nonteleological explanations" best explain how I behave does not entail any moral conclusion.

Suppose my moral perplexity is to discover, in Kierkegaard's phrase, "How I am to live and die"; that is to say, to find out "the purpose of my existence." Now, by putting it as "What is the purpose of my existence?" I make it sound as if I were asking a question of the same logical type as "What is the purpose of my doorbell?" — a question that can admit of a clear factual answer. But though these questions have a grammatical similarity they have very different uses in human discourse. As Ayer has well said:

> . . . what is being sought by those who demand to know the meaning of life is not an explanation of the facts of their existence, but justification. Consequently a theory that informs them merely that the course of events is so arranged as to lead inevitably to a certain end does nothing to meet their need. For the end in question will not be one that they themselves have chosen.[36]

My teleological discoveries will not in and of themselves resolve my problem of choice. They tell me *how* (in what way) I am living but they do not tell me how *I am* to live and die. "X has such and such end" does not entail "Do X." When a perplexed person asks: "What is the meaning of life?" he is almost always asking a practical question. He is trying to decide what he is *to do,* and he is only interested in knowing what is the case to the degree that a certain understanding is essential for any action. It is an answer to this *practical* question that his "soul longs after, as the African desert thirsts for water."[37] But no general description of the world, no causal explanation — teleological or otherwise — entails an expression of a decision; and the

35. R. M. Hare, *Universalisability,* Aristotelian Society Proceedings 295-312 (1954-55).
36. A. J. Ayer, *The Claims of Philosophy,* 7 Polemic 24 (1947).
37. Soren Kierkegaard, in A Kierkegaard Anthology 4-5 (ed. by Robert Bretall, Princeton, 1951).

language of purpose, as used in moral discourse (though not necessarily in philosophical interpretations or morality), is a bit of practical discourse in which the key expressions function to express decisions, intentions and the like. They describe as well, but shorn of this expressive or performatory use the utterances are without normative or prescriptive import.

This same general point can be made in another way. When "Life has a purpose" is taken as a physical or metaphysical explanation or description of human behavior and *not* as an expression of an attitude or of an intention to act in a deliberate, responsible, self-conscious manner, no moral decision or resolution to a practical problem is entailed by the discovery that I am "purposing" or moving to my natural end. If my behaving teleologically is *just* something that happens to me by virtue of my being a human being, then it cannot also function prescriptively. And this tautology has a point because it marks a distinction in the uses of language.

Since taking a moral position necessarily involves the making of a decision, I (as a moral agent) still will have to decide and resolve to seek this end that I notice human beings in fact seek. I must make, by a moral decision, this purpose or end (including my *purpose* or *end,* so metaphysically defined) *my* purpose or end. But this is something I must, as a mere matter of the logic of the situation, choose or decide to do. I cannot just infer it, observe it, or grasp it by some "intellectual intuition of being." I may see or notice purpose in the metaphysical sense; but until I have, by my own free resolution, decided I should act on this information, I have not arrived at any moral conclusions.

I cannot derive (1) "This is my purpose" or "This is my goal" taken as expressions of decisions from (2) "This is my purpose" or "This is my goal" taken as a metaphysical statement of some odd "value-fact." But since it is very easy to confuse the metaphysical statement (2) with the moral pronouncement (1), we tend to think that if (2) is true we have answered our practical question about what I am to do and how I am to live and die. Since the words "purpose" and "end" get redefined in (2) they can now be used so that purpose could exist even if no people were making decisions or resolutions and the like. On the metaphysical interpretation, "The purpose of my life is. . ." is treated very much like "My life expectancy is. . ." But in ordinary discourse "The purpose of my life is. . ." is used primarily not to state a fact but to announce a policy. To ask "What is the purpose of my existence?" is to ask "What ought I to do?" This is a practical question about what to do and does not involve us in any metaphysics at all.

When we think we can derive moral conclusions from the metaphysical statement that "Human life, and therefore my life, has a certain purpose,"

we transfer the ordinary moral meaning of "purpose" onto the metaphysical statement, making the metaphysical statement into (among other things) an expression of a decision. The metaphysical statement in effect redefines "purpose" but the redefinition is leaky; the old use sneaks back in and gives the analysis far greater plausibility than it *in fact* has.[38] But the metaphysical statement is not meant to be such a practical utterance, and "purpose" on the metaphysical use will not bear such a burden.

It may be replied, "But it really will, and metaphysical statements have their practical uses too. That is the small *grain* of truth in the contention that 'metaphysics is disguised poetry.'" But then it must also be admitted that, so used, the metaphysical statement (2) can no longer be understood as presupposing that it makes sense to speak of the purpose of human beings apart from what attitudes they adopt, what intentions they express, or what decisions they make. To say "Life has a purpose even though no one thinks so or cares about anything" will no longer make sense except as a moral expression of intention on the part of the user. But I should think a Thomist would want very much to argue that life does have a purpose even though no one thinks it does or makes any resolutions. The natural moral law, on a Thomistic interpretation, is not a summary expression of our most pervasive and basic decisions. If some super Communists or super Fascists did some very thorough super brainwashing, all of us might come to believe that life has no purpose, existence no end. We might all come to believe that we die and rot and do what we do because in some basically arbitrary way we have been so stimulated, but Thomists would argue that even in such a malebolge the natural moral law would still obtain. Even if the super Communists or super whatnots became trapped by their own propaganda and no one even dimly understood Life's purpose, life would, in such a view, still have a purpose. Such a *Brave New World* situation is conceivable; but even if it did obtain, the unwritten Laws of God would remain in force: human existence — the Thomists would say — would still have its original and distinctive purpose, for the natural moral law is something ordained by God, not something made by man. Maritain repeatedly warns us that man is not the measure of good and evil, and man is not the measure of "the purpose of men"; rather, man dimly apprehends the natural moral law and the purpose of his existence, and this purpose would exist even if no one thought it existed. But if what I said above is correct, such a view cannot be true.

38. See Ronald Hepburn on "leaky redefinitions" in Ronald W. Hepburn, *Literary and Logical Analysis*, 8 THE PHILOSOPHICAL QUARTERLY 342-57 (1958).

IX

I have tried to state and appraise the Thomistic theory of natural moral law. My central criticisms of the theory occur in VI; VII and VIII are primarily directed to those who may feel my last criticism in VI would not hold if the universe has purpose or design. I have contended there is no good reason to believe the universe has this purpose; and even if there were this purpose, we still could not derive moral conclusions from this true statement about our world or from observations of human behavior. But even if all this is rejected, my other three criticisms remain.

It is perhaps natural for someone to reply to my arguments in VIII: "Aren't you really ringing changes on what G. E. Moore called the 'naturalistic fallacy'; aren't you really just showing that evaluations are evaluations and descriptions are descriptions and that, as long as human discourse has the functions it has, we cannot reduce the one to the other, though we can point out that certain words and sentences can, and do, function both descriptively and evaluatively?" And the answer to this is "Yes."

But then an interlocutor might remark: "To be clear we must accept this, but isn't it also clear that if 'good' is to have any meaning at all — and surely it has — it must be connected with what human beings in their rational moments strive for, desire, or need? If good isn't what reasonable human beings really want when they understand their place in nature and the causes and consequences of their desires and their distinctively human qualities, pray tell what is it or what can it be? If we really come to understand 'what man is for,' will we not come to understand — all subtleties about the 'is' and the 'ought' aside — what is really good and what we really ought to do? Now isn't it the case that honest and reasonable men could claim the contrary only in their studies?"

And once again I would want to say "yes," but I would also want to block some very mistaken inferences from this that the Thomists make and to make some crucial and hardheaded qualifications to this. I attempted to do this in VI, but let me make it perfectly clear that I am not in the least suggesting that all is dross in Aquinas. It is abundantly clear that he is one of the great moral philosophers. Calling attention to the importance of understanding ourselves and our place in nature in determining what we ought to do is a permanent and useful insight of the Thomistic-Aristotelian tradition, though I think in connecting it with the rational commands of the Deity this insight has been badly blurred.

If we are to gain a firm understanding of the foundations of morality, it is necessary to explain and note the mistaken inferences and to make clear the necessary qualifications. Three of these might be re-emphasized here:

1) "What are people for?" — though linguistically similar to "What are chairs for?" or "What is the liver for?" — is very different from either of these quite different questions. I have contended that there is no good reason to believe there is a Designer. If there is no Designer, "What are people for?" would not have an answer like "What are chairs for?" There would be no room for the answer: "People were made for . . ." I have also argued that there is no clear evidence from the sciences of man, presently at least, that justifies our saying "What are people for?" has an answer like "What is the liver for?" From a scientific point of view it has been denied that we can speak meaningfully of "the nature of human nature."

2) Even if there is, as Sartre reminds us, human nature a posteriori but no "essence" of man, may not man, as Nietzsche said, be something to be surpassed; or may it not be the case, as D. H. Lawrence seems at times to suggest, that we ought to seek to destroy or at least submerge that which is distinctively human and firmly fix ourselves in our animal ancestry? I do not, of course, wish to urge either of these positions, but I do wish to point out that they are intelligible and that we cannot refute them by simply pointing to what people want or to what is normal, assuming (as we cannot in fact) that there are clear cross-cultural criteria for "normalcy." And it is just here that the importance of the features centering around the "naturalistic fallacy" becomes relevant; reflection on Moore's distinctions should make us realize that in morals, after we weigh up all the considerations for and against something, it still must be the case that we as moral agents must decide what is good and evil. (The force of "must" in both occurrences is logical.) The existentialists have dramatized this fact about the moral life in a very misleading way, but Ayer, Hare, and Nowell-Smith have recently made us see how this is a logical truth about the functions of normative discourse.

3) Even if there is an anthropologically confirmed "core" to the human animal and a notion that man has a distinct function, this would in no way serve to establish the Thomistic theory of the natural moral law. Such "natural good" would be quite explicable on a theory like Dewey's or Fromm's, and it is equally compatible with the kind of rational ethic articulated by Toulmin, Nowell-Smith, and Baier. It is even compatible with Russell's or Hume's theory. And some of these theories have the advantage of making far fewer assumptions than does the natural moral law theory. If there is no "core to the onion," the natural moral law theory is wrong; but if there is, it

does not at all follow that the natural moral law theory is right or even probable.

Finally, I want to make it clear that I see no good reason to say that if a theory like Aquinas' and Maritain's is unsound the foundations of morality totters, throwing us into the "night of subjectivity." Even if Hume, Russell, and Ayer in their analyses of morality are right, it still does not follow that there can be no rationality to the moral life.[39] There is no good reason at all to say, "If there is no God, then everything is permitted." This is in itself a moral judgment; it can be denied without self-contradiction, and there are those who in the name of morality would deny it. In a perfectly plain sense, some moral judgments can be justified and some objective moral appraisals can be made.[40] Rejection of the Thomistic ethical theory need not entail nihilism, cynicism, subjectivism, or relativism. And it does not even entail that there are no "natural moral goods." A recognition of the unsoundness of the Thomistic natural moral theory does not make the moral life or the life of reason impossible, but should, if correct, further it. And this should be a blessing for the man who, in W. D. Falk's phrase, is committed to the principle of nonevasive living.

39. I have tried to show how Russell's analysis does not involve these nihilistic and irrational implications in my forthcoming article, *Bertrand Russell's New Ethic,* METHODOS.

40. This has been ably argued by STEPHEN TOULMIN, AN EXAMINATION OF THE PLACE OF REASON IN ETHICS (Cambridge, England, 1951); and by KURT BAIER, THE MORAL POINT OF VIEW (Ithaca, 1958). I have tried to argue for this myself in my *Justification and Moral Reasoning,* 9 METHODOS 98-111 (1957); *The Functions of Moral Discourse,* 7 PHILOSOPHICAL QUARTERLY 236-248 (1957); *Good Reasons in Ethics,* 24 THEORIA 9-28 (1958); and in my forthcoming article, *The Good Reasons Approach and Ontological Justifications of Morality,* to be published in THE PHILOSOPHICAL QUARTERLY.

ARISTOTLE ON NATURAL LAW

Max Salomon Shellens

WHEN DISCUSSING LAW AND JUSTICE philosophers and historians almost invariably claim that Aristotle[1] is the father of natural law. The truth of this claim will not be contested here. However, without a clear understanding of what Aristotle meant by the expression "natural law," the claim that he was the father of natural law has little significance.

I

1. Aristotle did not coin the term *δίκαιον φυσικόν*, nor was he the first person to relate 'justice' to 'nature.' It is important to stress this in order to appreciate fully the way he approaches the problem of natural law in its various aspects. Largely through the teachings of the Sophists the expression *δίκαιον φυσικόν* had become quite popular by the time of Aristotle.[2] Despite considerable doctrinal differences in various dicta of the Sophists concerning the *δίκαιον φυσικόν* they all share a polemical character. Aristotle's treatment of this subject is polemical too; but what distinguishes him from his predecessors is the fact that he endeavors to overcome a purely negative attitude, thereby turning a slogan into a serious problem. In sum, by clarifying the idea of justice as a whole, he seeks a constructive approach to the problem of *δίκαιον φυσικόν*.

The far-reaching significance of his achievement has not yet been fully appreciated. Hence a new and unbiased inquiry seems to be desirable.[3]

Only a classical philologist could determine the manner in which the various Aristotelian writings on natural law are related to one another; and only he could determine the chronological order of these writings. Solutions to

1. The following abbreviations are being used in the footnotes:
   An. Pr.: *Analytica Priora*
   C.: *Categories*
   E.E.: *Eudemian Ethics*
   E.N.: *Nicomachean Ethics*
   M.: *Metaphysics*
   M.M.: *Magna Moralia*
   Poe.: *Poetics*
   Pol.: *Politics*
   Rh.: *Rhetoric*
2. See my essay, *Der Begriff des Naturrechts bei den Sophisten,* 32 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (Rom. Abt.) 129.
3. Of my own publications I refer to: DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, published under the name Max Salomon (1937); *Von den Dingen, die sich auch anders verhalten können,* 5 ARCHIV FÜR PHILOSOPHIE 305 ff.; *Der Begriff des Naturrechts in der Grossen Ethik,* 41 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 422 ff. This essay is full of misprints and other mishaps, for I was, sorry to say, not given the opportunity to read the proofs.

these philological questions would be of considerable importance. They would determine whether there was, in Aristotle's thought, a development toward a deeper conception of the problem of natural law, corresponding to the development of his insights in the realms of sociology and history.

Aristotle's authorship of the *Nicomachean Ethics,* the *Politics,* and the *Rhetoric* cannot reasonably be challenged. However, the same cannot be said of the *Magna Moralia.* It has been argued by some that this work was composed by a disciple either of Aristotle or possibly of Theophrastus. Others regard Aristotle himself as the true author. These are moot questions[4] not yet answered to everyone's satisfaction; but whatever the ultimate answer may be, the *Magna Moralia* exhibits the thought of Aristotle and his school. Hence it is of utmost importance to examine thoroughly the treatment in the *Magna Moralia* of the idea of justice and of the question of natural law. On certain points there is a close affinity between the *Nicomachean Ethics* and the *Magna Moralia.* For instance, one finds the problem of changeability and the reference to right-handed and ambidextrous people in both works. But the basic meaning of the term "natural law" as used in the *Magna Moralia* differs fundamentally from that in the *Nicomachean Ethics.*

The doubtful authorship of the *Magna Moralia* may be the reason why discussions of Aristotle's views on natural law center upon the *Nicomachean Ethics,* the *Politics,* and the *Rhetoric.* This is a great mistake. Whether we can attribute the *Magna Moralia* to Aristotle himself is, from a systematic point of view, of little importance. For did not Socrates inform Charmides that it is not as important to determine who said certain words as it is to determine whether they are true or not? [5]

Ignoring for the time being the purely philological problems of authenticity, it is our aim to use the statements about natural law in the four texts mentioned as a means to a better understanding of the complex problem of natural law in particular and of justice in general. (The *Eudemian Ethics,* it will be noted, does not make an independent contribution to the discussion. The passages on justice found there are the same as those contained in the *Nicomachean Ethics.*)

Having thus established the limits of our subject, we now begin the discussion of it.

2. As for the terminology in general, it cannot be denied that the term δίκαιον φυσικὸν is more satisfactory than the more equivocal expression

4. See the most instructive work by SCHAECHER, STUDIEN ZU DEN ETHIKEN DES CORPUS ARISTOTELICUM (1940); and the German translation of the *Magna Moralia* by Gohlke (1951).

5. PLATO, CHARMIDES 161B.

'natural law.' We make a clear statement when we say: "of justice part is natural, part is legal."[6] Such a statement cannot easily be misunderstood; it declares that the second part, namely, legal justice, is man-made justice. Conversely, it makes natural justice an eternally open question, unsolved and maybe unsolvable. Because of the close affinity of 'legal' and 'law,' the term 'natural law' is more likely to be confounded with man-made law than the term 'natural justice.' Also, at times it might be safer to approach the whole problem of natural law in terms of whether a certain conduct accords with natural justice. However, since the term 'natural law' is commonly used, we shall follow the established tradition and speak, though with some hesitation, about natural law and legal law.

Similar difficulties are inherent in the Greek term *νόμος*. To translate it simply as 'law' leads to considerable misunderstanding. We would have to stretch the meaning of 'law' unduly in order to arrive at the correct meaning of the Greek term. The term *νόμος* refers not only to what we commonly call 'law,' but also to the principles of customs, morals, manners and habits — to everything which is a principle of order within social life. Thus we read in the *Rhetoric*[7] that courage, as well as temperance and justice, is based on the *νόμος*, and that they are in accord with the dictates of the *νόμος*.[8] The *νόμος*, so to speak, is at work wherever people submit to, and feel bound by, propositions deciding the worthiness or unworthiness of a certain behavior within a given community. Although the English language, too, uses the term 'law' in a fairly broad sense, encompassing the rules of nature as well as the rules of games, it is still too restricted a concept to express the fullness of the Greek *νόμος*. 'Norm,' on the other hand, is probably a more satisfactory translation.

Whether such a norm is written or not is unimportant. The decisive characteristic of a norm is that it is fixed (in some way) and enacted. Aristotle repeatedly refers to the 'lawgiver,' the *νομοθέτης*. But when using this expression he does not have in mind the actual 'writer' or the author of a specific norm. The *νομοθέτης* is not a mythical entity either: he is quite simply that authority which in the accepted sense has the power to lay down a norm.

This being so, our subsequent remarks will focus on the terms *justice, natural law, legal law,* and *norm.*

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6. E.N. 1134 b 18, translation by W. D. Ross.
7. Rh. 1366 b 10 ff.
8. *ὡς ὁ νόμος κελεύει.*

II

1. According to traditional opinion, Aristotle's 'true' meaning of natural law has been laid down in unequivocal terms in the *Rhetoric*. Since it is never advisable completely to ignore traditional views, let us consider whether we have to read only the *Rhetoric* in order to understand Aristotle's conception of natural law. The *Rhetoric,* to be sure, contains important references to natural law, although the term itself is rarely used. It is here that we are told that the law is either particular or general:[9] particular law is that law which is applied by a particular state in administering justice; general law is that law which, being acknowledged and recognized by everybody, is not confined to a particular state. The latter is logically unwritten law.

This dualism is later examined[10] through the following two questions: What is the special character of each of the two kinds of law? What does each of them signify? We are told by way of a restatement of the previous definition that particular law is restricted to the people who enacted it. General law is defined as that law which is *κατὰ φύσιν* or 'according to nature.'[11] In this manner the term *κατὰ φύσιν* is introduced into the discussion of natural law. Once again we are confronted with the problem of written *vs.* unwritten in connection with all laws, whether particular or general. While it is taken for granted that a general law can only be unwritten, a particular law is described as being either written or unwritten.[12] In order to understand the teachings of the *Rhetoric* great pains should be taken not to confuse general with particular unwritten laws.

In the context of Aristotle's discussion in the *Rhetoric* the term 'unwritten law' is used in at least four distinct ways:

(a) In human life as well as in theory there is always the possibility of excess. It is here that we have to seek the distinction between virtue and vice.[13] How does the written law operate in such cases? The answer can only be that it is silent; it does not envisage such a problem. Since we cannot help trying to find a solution to the problems involved, we turn to unwritten laws. But how do we explain that the written law, any written law, is not capable of coping with these difficulties? The answer can only be that the actions in question are not within the purview of written law.

In this connection the term 'law' has a dual meaning: a wider one expressed by the term of 'unwritten law,' and a more restricted one referred

9. *ἴδιος — κοινός.* Rh. 1368 b 8.
10. Rh. 1373 b 4.
11. Rh. 1373 b 6.
12. Rh. 1373 b 5.
13. Rh. 1374 a 21 ff.

to by the term 'written law.' If this were not so, the unwritten law would not be capable of facing a problem at the point where the written law must fail by its own standards or limitations as a law. Evidently the meaning is (1) that the action in question lies beyond the reaches of justice proper; (2) that the unwritten law is a norm (as explained above) but not a law; and (3) that it aims at moral, ethical, and possibly religious values or whatever takes their place, but not at justice in the usual and more specific meaning of the term. In order to understand these thoughts we may refer to the explicit distinction, found in the *Nicomachean Ethics*,[14] between justice in a wider and in a narrower sense. Justice in its comprehensive meaning knows only one norm: to act and to behave like an honest and decent man — *"honeste vivere."* This norm, whatever its content, cannot, of course, be written law.

The difference between written and unwritten laws is to be found not in the way laws approach the reality they are supposed to control, but in the system of values (of which justice is a member) which is applied to this reality. Individual problems of evaluation themselves express the conditions for applying the system or systems of values used in evaluation. As far as justice itself is concerned this kind of unwritten law does not refer to justice at all, unless — as is always possible — this term is stretched beyond its limits.

(b) In another connection[15] we learn, by way of an apparent anomaly, that there is a kind of particular law that is supposed to be unwritten law. Particular law, Aristotle restates here,[16] is a special agreement made by the community and concerning that community; hence it is binding only upon that particular community. But where a definite agreement exists, the law, too, must be definite (or written). An unwritten (indefinite) law which has expressly (definitely) been agreed upon is a contradiction in itself. Thus a law is necessarily a written law if its source is a definite agreement. Aristotle, however, gives neither examples nor further explanations of particular unwritten laws.

It is quite possible, therefore, that here he may have equity in mind. Only the rule of equity is at the same time particular and general. Unwritten laws in the form of particular laws would then play the same role as general laws do in the entire realm of justice. At this point it is advisable to discuss Aristotle's concept of equity.

(c) Whenever Aristotle discusses equity at greater length he posits a direct relation between equity and the unwritten law: written and unwritten laws are no longer contrasted but are placed parallel to one another. It is

14. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra*, note 3 at 10 ff.
15. Rh. 1373 b 6.
16. Rh. 1374 b 19.

clearly stated that equity is justice, but a justice "alongside" the written law (*τὸ παρὰ τὸν γεγραμμένον δίκαιον*).[17] Now the word *παρὰ* does not have the meaning of 'above' or 'against,' as it has often been rendered. Equity plays a special role with regard to written laws by making up for the deficiencies or human shortcomings of the legislator. This recalls what we said before about the personality of the 'legislator.'

One aspect of the legislator's deficiency can be accounted for as follows. A legal term is used to refer to an indefinite number of situations, no two of which are identical in all relevant aspects. A whole lifetime would not suffice to enumerate these situations.[18] Thus, a definition proposed for a legal term by a legislator will in all likelihood fail to give precise limits to the application of the term. Accordingly, either the need for new definitions will be recognized[19] or the lawgiver will overlook the inadequacy of his proposals, thinking that they will serve in all situations. In either event unanticipated circumstances are bound to arise. Hence there must be something to make up for this deficiency.

Reading the text of the *Rhetoric* up to this point, one can hardly see how equity, called upon to fill an unavoidable gap in the written law, may be able to tell us anything about natural law, which is obviously 'unwritten law.' Problems arising from the practical application of the written law, however, have to be met, we are advised, by the legislator. The spirit of the written laws as well as the values they express should be honored and treated as a guide. And the written laws should never be overturned. In this way no 'new' kind of justice will be created. Neither will anything be decided contrary to the fixed (or written) law. This is exactly what the idea of natural law demands.

Thus far the concept of an unwritten law contributes little to our understanding of what natural law actually means. Aristotle, however, has still more to say about equity. We know from practical experience that in certain instances a specific conduct may be "illegal" and still be "equitable"; that is, in accordance with the principles of justice and righteousness. In such cases we should not adhere to the wording of the law, but look at the intentions of the lawgiver and settle the dispute by "arbitration." Does this imply that legal justice should be abolished and replaced by something else called "equity"? Far from it. When we check Aristotle's statements we see quite another picture. No one has a right to be judged by any other standard than justice. Hence Aristotle does not suggest that in certain cases the court should apply

17. Rh. 1374 a 25.
18. Rh. 1374 a 33.
19. Rh. 1374 a 27.

"equity." He suggests that the plaintiff, the person or party whose legal rights were infringed upon and, hence, who has an actionable claim (in the language of the *Nicomachean Ethics,*[20] he has *τὸν νόμον βοηθόν* — he is backed by justice) should renounce his rights and change from an *ἀκριβοδίκαιος* to *μὴ ἀκριβοδίκαιος* by putting reason above his legal right, equity above justice.[21]

The "norms" or "rules" of equity are not of the kind that could be written down. That is their very essence. Here once more we encounter a form of "unwritten law." But this kind of "unwritten law" is not natural law. Nor does it help to solve the real problem of natural law.

(d) Previously we have used the expressions "particular law" and "general law." In the *Rhetoric,*[22] where the unwritten law is identified with natural law, these two terms are dealt with in more detail. Natural law exists without an agreement, and it does not require any form of association.

The "general law," we are told, contains more justice and gives more truth and expediency and accomplishes the work of the law better than its counterpart, the written (or "particular") law.[23] Being general, it does not undergo any changes,[24] while the written law frequently varies.[25] These are also the arguments, according to Aristotle, by which Antigone justifies her disregard of Creon's order. Sophocles calls the law she follows 'eternal.'

In this context the terms "eternal" and "unchangeable" evidently mean something not limited by territorial boundaries, not changing from country to country. It is not immediately evident why the unwritten law should serve justice better simply because it is not subject to change. On this point, however, the *Rhetoric* offers no further explanations. We shall see later that the problem of changeability plays an important role in the discussions of natural law in the *Eudemian Ethics* and in the *Magna Moralia.* Not being enforceable by sanctions, the unwritten law is definitely at a disadvantage.[26] The question of compulsion, on the other hand, is closely related to the questions of certainty and dependability. Thus for the 'higher' form of justice there is no evidence in the form of a proof. The analogy with equity is not convincing. The idea of an eternal, never changing law stirs our imagination and appeals to our emotional feeling. This is not true, however, of the written law — the rigidly strict norm, unmerciful in particular circumstances. But is it really

20. E.N. 1138 1 ff.
21. Rh. 1373 b 4.
22. *κοινὸν δὲ τὸν κατὰ φύσιν.* Rh. 1373 b 6.
23. *ὡς δικαιοτέροις.* Rh. 1375 a 28.
24. *δεῖ μένει καὶ οὐδέποτε μεταβάλλει.* Rh. 1375 a 32.
25. *πολλάκις.* Rh. 1375 a 33.
26. *ἐξ ἀνάγκης.* Rh. 1375 a 18.

the task of justice to be merciful and accommodating? Only a truly philosophical or scientific approach can decide between the law based on fixed norms and the law based on 'nature.'

2. So far, however, these questions cannot be fully answered. In order to understand what Aristotle really says, his statements should not be read out of context.

The method of the *Rhetoric* is, of course, bound to be scientific. Its conclusions obviously are not supposed to be *aporiae* or "fictions." Its subject, however, is not science or ethics or anything of the kind. Neither the truth of scientific statements nor the moral value of clearly defined actions is scientifically explored here. For there is one thing that the *Rhetoric* definitely does not do: it does not weigh values. Its aim is to demonstrate something quite different, namely, the most efficient manner of 'persuasion' [27] in the interest of certain ends which are taken for granted and are not examined in themselves. In themselves these ends are not necessarily related to scientific truth or to moral values. No one knows better than Aristotle the difference, for instance, between statesmanship and rhetoric. Merely to call attention to values and value judgments without discussing or judging their merits is, for Aristotle, pure sophistry.

There are, Aristotle insists, five 'nontechnical' means of persuasion characteristic of forensic oratory (where undoubtedly we have to deal with the idea of justice). One of these is the laws, and others are witnesses, contracts, torture, and oaths. Since we are actually confronted with a dual "set" of laws, namely, fixed laws and unfixed laws, a forensic orator is faced with the alternative of invoking either the one or the other. But he cannot appeal to both at the same time.

It might be helpful to translate the relevant paragraphs from the *Rhetoric* into the language of our time.

"Students of the law or lawyers-to-be, if you wish to win your case in the law courts, remind 'the jury' that it is their sacred duty to do justice — justice and nothing else; that while giving their verdict in this particular case they are serving the most sacred idea the world has ever known. When they are thus truly impressed and are convinced that by their vote they decide the fate of justice, then you may concentrate on your special case (up to this point you cannot go wrong by using identical words and sentences). If the law is in your favor, you must then argue that this sacred justice rests on nothing else but the law which is open to everyone's inspection and verification, as well as on the respect towards the wisdom and greatness of the rules

27. Rh. 1355 b 27.

that have been transmitted to us by our forefathers or promulgated by a wise and impartial government. How can anyone be permitted to trifle with such institutions![28] However, should the law be against your client's case, then plead exactly the other way round,[29] but still display the same air of conviction: stress the insufficiency and the logical limitations of statements contained in rigid generalities, and their inability to cope adequately with the unforseeable complexity of the concrete problem at issue. Whatever your case may be, this leads you immediately to claim that the jurors cannot but decide in your favor, adhering alternatively to the fixed law or to the natural law. And always, of course, to the *γνώμη ἡ ἀρίστη*.[30] In both instances you appear clearly to act as the devoted and humble servant of justice whose plea is motivated solely by his love of justice and nothing else. But in both instances your arguments make justice a servant of your particular interests. This is the best way to win your case."

We may also transfer this advice from law to politics, from how to win a legal argument to how to win an election. If the candidate belongs to the party in power, one would argue that the existing tradition has stood the test, that there is an inherent danger in new experiments, and that there is a duty to repay faith by faith. From the other side we would hear about the danger of permitting a situation to stagnate, and about the desirability of electing new people with new ideas. The campaign motto would be: "It is time for a change." Such slogans are known to everyone. This raises the question: Are the speech writers concerned with truth or are they merely interested in effective campaign oratory? To what extent is the sociologist who describes effective oratory concerned with the rightness or wrongness of such oratory?

These examples are designed to illustrate, by the use of modern terms, the teachings of the *Rhetoric*. Aristotle, to be sure, was not discussing the morality of such arguments. He merely revealed the weakness of human emotions and, what is even more relevant, how this weakness can be exploited. Undoubtedly, people want to win lawsuits or electoral contests. It is no secret that certain procedures help and others do harm. If we intend to study the reactions to rhetorical methods, we should be candid.

Aristotle knew that some persons held certain views about natural law, and that others held diametrically opposed views. The *Rhetoric,* however, does not prove or even discuss the validity of either of the opposed positions. The allusions to natural law in the *Rhetoric* neither estimate its moral value nor establish the relationship of "legal" law to natural law. Hence these allu-

28. *οὐ παρὰ τὸν νόμον δικάζειν.* Rh. 1375 a 30.
29. *μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις.* Rh. 1375 a 30.
30. Cf. LIPSIUS, 1 DAS ATTISCHE RECHT UND RECHTSVERFAHREN 152 (1905).

sions cannot possibly contain Aristotle's 'real' views on natural law. The aim of the *Rhetoric,* in regard to natural law, is to show that the term natural law is in vogue and that from a certain point of view it is considered an advantage to make use of its emotional appeal.

To sum up: In the *Rhetoric* Aristotle intends neither to assert nor to prove that the natural law holds any kind of superior position. No judgment is passed on natural law. He merely introduces us to a catchword without discussing its moral significance. Hence what he says here is neither an exaltation nor a depreciation of natural law.

III

1. "Insofar as law is not 'by nature' but is merely human enactment it is not the same everywhere. It is not even the case with regard to constitutions that they are everywhere the same, though there is only one constitution which is — by nature — everywhere the best."[31] This is the last sentence of the chapter on natural law contained in the *Nichomachean Ethics.* Here natural law plays the role of deciding questions of justice and, in so doing, it also judges the law that is actually in force. Now we can readily understand why Aristotle's authority is traditionally called upon to defend, and to glorify, the idea of natural law. The sentence quoted above contains the term ἡ ἀρίστη (the best).[32] Aristotle does not use such predicates as 'useful' or 'recommendable' or 'most serviceable'; neither does he call "the best constitution" 'right' or 'correct.' The term ἡ ἀρίστη assigns the statement to the realm of ethics or ethical judgments. The most important parts of the *Politics,* like those of the *Nicomachean Ethics,* are based on ethical valuations. The term ἡ ἀρίστη has the same ethical meaning in the *Nicomachean Ethics* and the *Politics* as it has in the *Eudemian Ethics,* a fact which closely relates these works.[33] The teachings of the *Politics* — and the same applies to the *Nicomachean Ethics* — do not aim at mere descriptions, except where we are presented with a collection of facts which are necessary to demonstrate how at different times certain problems have been dealt with. Politics and ethics are sciences, or to be more exact, axiomatic sciences defining, by the use of a scientific method of judgments and values, what should be and ought to be; what is bad and what is good. Hence the above sentence merely tells us what kind of constitution is the best according to the science of ethics.

There are many different constitutions which do not measure up to the

31. E.N. 1135 a 3-5.
32. E.N. 1135 a 5.
33. E.N. 1181 b 13 ff.

standard of "the best." Nevertheless, they are enforced as well as binding upon the citizens. This, we are told, is in conflict with the fact that general laws of nature must be, and are, everywhere the same. "Fire burns in exactly the same way in Persia as in other countries." [34] Hence in contrast to the laws of (physical) nature, legal laws may be valid but not in force, or in force but not valid (validity being a characteristic quality of natural law).

The distinction between "being in force" and "being valid" is one between two different spheres of spiritual being. The key to this problem can be found in the use of the term φύσις, in the *Nicomachean Ethics.* When we call a constitution "the best" — that is, when we declare it valid whether in force or not — we must realize that "being in force" and "being valid" have nothing to do with each other. A single law may have both of these properties or it may have one and lack the other; but this does not affect the properties themselves. 'Nature' belongs to another plane. What is valid by nature may actually be in force; but this "being in force" might be merely accidental.

When we select a single constitution and assert that it is the best of all constitutions, past and present, real or imaginary, then the other constitutions are not only not the best: they are bad, inferior, poor or whatever other value we wish to assign to them. It may be possible to show higher or lower degrees of adequacy. We see in the *Politics* that a bad form of government is always considered a perversion of the good form of government and, accordingly, opposed by the latter.[35] According to the more elaborate and evidently later teachings of the *Nicomachean Ethics,* it should not be difficult to indicate at least two contrasting "forms" opposed to the good "form" and, also, opposed to each other as "too much" [36] and "too little." [37] The good "form," it may be maintained, is the mean between two evils, or perhaps better, between two imperfect forms. We know that the problems of politics arise out of the problems of ethics. The judgment we pass on constitutions is "science" in the same way as moral teaching is science. But whereas it is not difficult to show, e.g., that liberality [38] is the mean between prodigality and meanness, and pride[39] the mean between vanity and humility, the definition of the "best government" offers some difficulty. The proof of what is the best government sometimes relies on the magic word "nature," or, as in the *Politics,* employs as a criterion the "common good," [40] without, however, linking this "common good" to "nature."

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34. E.N. 1134 b 26.
35. Pol. 1279 a 23 ff.
36. ὑπερβολή. E.N. 1108 b 12.
37. ἔλλειψις. E.N. 1108 b 12.
38. E.N. 1119 b 21 ff.
39. E.N. 1123 a 33 ff.
40. Pol. 1279 a 30.

According to the *Nicomachean Ethics,* one can demonstrate which kind of constitution is best. But the same cannot be said for the examples which Aristotle gives for law that is "not natural."[41] There is no way of deciding whether the rites for certain offerings should be a goat or two sheep. Or what the ransom should amount to. Here we have nothing like the 'best' solution.

The "nonnatural" (or "legal") law is referred to by a variety of names and descriptions: it is "not by nature";[42] "promulgated";[43] "based on agreement[44] and convenience";[45] or "merely human."[46] What is called "promulgated law" is that law which could possibly have been quite different.[47] Before it was promulgated,[48] there were several alternatives as to how this law might read.[49] But once promulgated,[50] it is "fixed." Thus we distinguish between the law that has actually been promulgated and the law that might have been promulgated.

This last description is the most important. But did not Aristotle mention changeability as a criterion of nonnatural law? It is mentioned[51] only to be denied the status of an essential characteristic. Promulgated law, to be sure, changes. But natural law may also change. Hence, seen from this point of view, no conspicuous difference exists between natural law and "nonnatural" law. However, the reasons for change in each kind of law differ. Therefore, when we see that laws undergo changes, this in itself does not indicate whether they are or are not "according to nature." The characteristic of changeability cannot be our criterion, although in itself natural law is *ἀκίνητον* — unchangeable.[52]

In connection with this argument of changeability, reference is made to the example of people becoming ambidextrous.[53] Even if every right-handed person learned to use the left hand with the same efficiency as the right hand, it would still be correct, Aristotle contends, to say that the right hand is "by nature" stronger than the left hand. It is hard to understand what this example means and what it is supposed to prove. The statement that even in the case of ambidextrous people the right hand is "by nature" (*φύσει*) stronger than the left hand is discussed at length and more clearly in the

41. E.N. 1134 b 21 f.
42. *τὰ μὴ φυσικά.* E.N. 1135 a 3.
43. *ὅταν δὲ θῶνται.* E.N. 1134 b 21.
44. *τὸ δοκεῖν ἢ μή.* E. N. 1134 b 20.
45. *τὰ δὲ κατὰ συνθήκεν.* E.N. 1134 b 35, 1134 b 32.
46. *ἀνθρώπινα.* E.N. 1135 a 4.
47. *οὐδὲν διαφέρει.* E.N. 1134 b 21.
48. *ἐξ ἀρχῆς.* E.N. 1134 b 20.
49. *οὕτως ἢ ἄλλως.* E.N. 1134 b 21.
50. *διαφέρει.* E.N. 1134 b 21.
51. E.N. 1134 b 25 ff.
52. E.N. 1134 b 25.
53. E.N. 1134 b 34 ff.

Magna Moralia.[54] There we are told the significance of the statement, "a possible change does not necessarily affect what is 'in accordance with' (or 'by') nature." But this is true only if the expression "according to nature" is used in the sense given it in the *Magna Moralia,* where its meaning is quite different from that found in the *Nicomachean Ethics.* The *Magna Moralia* holds that being "according to nature" means to be generally valid and not merely temporarily so. To become ambidextrous or to become left-handed does not change what is "according to nature," namely, the greater strength of the right hand. We may assume that this illustration, if not directly taken from the *Magna Moralia,* has been used by Aristotle's successors when they discussed the problem of the changeability of the natural law. It is also possible that the reference to this illustration was carried over into the φύσις-notion of the *Nicomachean Ethics* without being adapted to the profounder meaning it acquired there. In any case, all these discussions fail to shed any light on the real meaning of natural law in the *Nicomachean Ethics.*

We have already seen that the δίκαιον νομικὸν cannot be proved in the same way as the δίκαιον φυσικὸν can be proved. On the other hand, an enacted law could very well have been one way or another, something which is not true of a constitution. In addition, it is not true that all enacted laws, no matter what their subject may be, can be adjusted and improved to such a degree that they become natural laws. The enacted law is characterized by its original indifference towards its content — οὕτως ἢ ἄλλως, whereas natural law from the beginnning aims at being 'the best.'

2. The difference between δίκαιον φυσικὸν and δίκαιον νομικὸν does not arise because of human limitations; hence it cannot be overcome by greater efforts to grasp the truth. There are always good and bad constitutions; but they are good or bad "according to nature." The difference between a good and a bad constitution is not so great as that between laws which can be good or bad by nature and those which cannot be evaluated according to nature. This appears to be the central problem of Aristotle's theory in the *Nicomachean Ethics:* the difference between enacted law and natural law does not lie in the fact that the former gives the right and the latter gives the wrong solution to the same legal problem. This is the usual but erroneous interpretation of the difference between enacted and natural law. However, this difference is related to structural differences between the problems appropriate to each. A law which has the character of a natural law is different from the "mere human" law, not because the latter may be wrong "according to nature," but because the "human" law deals with a problem concerning which

54. See *infra,* IV.

it makes no sense to ask for a solution based on nature. If a legal problem does not belong to the sphere of natural law, no conceivable effort can invest the solution with validity "according to nature." Thus the difference between two sets, not of answers, but of potential laws is the difference of the highest importance, although it has not yet been taken into full account.

Once the easily misleading argument from changeability has been removed, it remains to point out that natural law and human law differ in respect to the δύναμις.[55] Natural law has everywhere the same δύναμις: mere human law has not.

The meaning of the term is not readily understood because it is not explained in this context and is, in itself, ambiguous. We read in the *Nicomachean Ethics*[56] that the two kinds of justice — natural law and human law — are alike in that both are directed πρὸς ἕτερον,[57] and this property is called their δύναμις. This word is evidently used to point out one of their characteristics and essential qualities. We learn in the *Metaphysics* that the primary material is unchangeable ἐκ τῆς δυνάμεως τῆς αὐτοῦ.[58] We may presume that by claiming the same δύναμις everywhere for natural law, the word is being used metaphorically[59] in a more pregnant sense than it could have in connection with, e.g., geometry. It indicates a norm[60] immanent in things themselves, a norm which is not dependent upon human discretion.

Natural law has everywhere the same δύναμις; the mere human law could with equal propriety be different. Therefore, natural law is not capable of being different than it is; mere human law does not have everywhere the same δύναμις.

Things are either capable or not capable of being different than they are; *tertium non datur*. This idea is found in all the teachings of Aristotle. This may be the reason why no special explanation of it is given in the chapter on natural law, where, as we see, it plays a decisive role. However, the idea is dealt with in a later chapter of the *Nicomachean Ethics*.[61] In this description we find what Aristotle means by justice based on φύσις. Things that are capable of being other than they are,[62] are excluded as subjects of scientific knowledge.[63] Only the necessary can be a subject of scientific knowl-

55. E.N. 1134 b 19, 26.
56. See *infra*.
57. E.N. 1134 b 1.
58. M. 1014 b 28.
59. M. 1019 b 33, 1046 a 7.
60. M. 1078 a 28.
61. E.N. 1139 a 8 ff.
62. τῶν ἐνδεχομένων καὶ ἄλλως ἔχειν. E.N. 1134 b 31.
63. An. Pr. 88 b 32 ff.

edge.[64] Necessity is limited to things that cannot be otherwise,[65] or, from another point of view, it is limited to things whose basis and essence are not capable of being otherwise.[66] We can trace this dividing line even in the doctrine of essential and nonessential accidents. There can be demonstrative knowledge of essential accidents, but not of nonessential accidents.[67]

And so the doctrine of natural law is a science; its methods are the methods of a science. The doctrine of the other kind of justice has neither the dignity nor the rigor of a science; and its methods must be nonscientific.

This description of the doctrine of nonnatural law is negative. We have, however, other descriptions which are definitely positive. Only things that are capable of being other than they are permit reflection, deliberation, and decision.[68] Only in this area may questions be settled arbitrarily. In the field of science this is not true. Mathematics and physics do not allow decisions. We cannot deliberate on whether or not the angles of the triangle should be equal to two right angles[69] or if the diagonal of the quadrangle should be commensurable.[70] In this respect there is no room for resolution and decision, but only for recognition and proof. The same applies, as should be stressed at once, to the field of history. Concerning whether or not Troy has been destroyed, no decision is possible.[71] Things of the past are not capable of being otherwise. Insofar even the gods are bound.[72]

Accordingly, we can only recognize, but not decide upon, laws in force at a previous time or at present. In this respect we are faced by facts which we ourselves cannot change or influence. However, what the provisions of specific nonnatural law should be is not something for mere recognition but, on the other hand, requires reflection, deliberation, and decision.

3. The examples of mere human law in the *Nicomachean Ethics* (amount of the ransom, rites of sacrifices) are not representative of all nonnatural law. Natural law is not involved when rules are given for a singular and isolated case or when a plebiscite is involved.[73] The word "plebiscite" does not convey Aristotle's meaning precisely: *ψηφίσματα* are norms put into force on the spur of the moment, without due deliberation and without a full examination of their universal application. It is evident that such human laws are

64. E.N. 1140 b 32.
65. M. 1026 a 27 ff.
66. E.N. 1139 a 8.
67. An. Pr. 75 a 18.
68. Rh. 1357 a 6. Cf. E.N. 1112 a 19 ff.
69. See, for instance, E.N. 1140 b 26.
70. See, for instance, M. 1019 b 26.
71. E.N. 1139 b 8.
72. E.N. 1139 b 10.
73. E.N. 1134 b 23.

different from the previous ones. The lesson is clear. Natural law is not a law outside or beyond justice. Before a norm can be considered either a natural or a human law it must satisfy the conditions of justice as a whole.[74] Human justice is not a disfiguration of justice waiting to be corrected and improved by natural law. Human justice is justice — only not of the same kind as natural law.

And so there are certain conditions that must be fulfilled if a norm, be it natural or human, is to be a norm of justice, of justice proper and not of other ideas no matter how exalted. One essential characteristic of justice as a whole is its universality.[75] We always have a general rule[76] on the one hand and an infinite number of cases[77] falling under this rule on the other. This statement, of such high importance for the fundamentals of justice, occurs in the text of the *Nicomachean Ethics* without any visible link to the chapter on natural law. It can be understood only as an explanation of the previous observation that rules referring to only a single case cannot be taken as rules of justice. The honors accorded Brasidas[78] are outside the area of natural law, not because Aristotle disapproves of this commemoration or because he rejects deification in general (nothing of this kind is hinted at) but because the corresponding regulations do not belong to the realm of justice at all, whatever their aims may be. With regard to *ψηφίσματα*, the position of Aristotle is well defined.[79]

From all this it would follow that natural law is not present (a) where the answer to a problem depends upon our free moral decision and, hence, cannot be supplied by scientific proof; and (b) where no rule of a general character is involved.

Similarly, where there is no general rule there is no justice. We are approaching what can be called a general theory of justice or jurisprudence. Its role is to determine what the conditions and presuppositions are for a norm to be a norm of justice in the strict sense. When we set out to answer this question we are aware that it is not offered for our personal deliberations. We cannot decide at will if the limits of justice should be so or otherwise; what we have to do is to recognize them. We are in this respect exploring the "a priori" of justice.

Even though the problems relating to the "a priori" of justice are of a scientific character and would seem, therefore, to be confined to the area of

74. E.N. 1134 b 18.
75. *καθόλου*. E.N. 1135 a 8.
76. *'έκαστον 'έν*. E.N. 1135 a 8.
77. *τὰ . . . πραττόμενα πολλά*. E.N. 1135 a 7.
78. E.N. 1134 b 23.
79. Pol. 1292 a 20.

natural law, this is not the case. We must, however, realize that the term "natural law" is too often stretched in its application to the theory of the "a priori" of justice. Whether or not this is done, the fact remains that the subject of these problems is in any case completely different. In the language of Aristotle, the "a priori" of justice is called δίκαιον ἁπλώς.[80] The natural law does not pass judgment on the human law, for only something above both kinds of justice can do this.

The doctrine of the "a priori" of justice seeks to bring the foundations of justice to light, to show the premises of what is just. It neither tries nor is able to provide concrete answers to practical questions. It does not produce the 'best' solution to a specific legal problem, e.g., that of the best constitution. This is, so to speak, the curse of the theory; it appears 'useless' from a practical point of view, and it will always be neglected for just this reason. Exactly the same applies, however, to the theory of natural law as presented in the *Nicomachean Ethics.* Aristotle does not teach us how to prove that a law is a natural law, e.g., how to deduce the 'best' government from the higher principle and so to demonstrate that it is really the best. He follows the approach he uses to best advantage in all his teachings of ethics. He attempts to arouse in us a feeling for values and their quality, taking as a standard the honest and esteemed citizen of his age.

Accordingly, when he refers to natural law in his various writings he goes beyond mere formal declarations. He prefers here, as always, to show his methods in actual operation. An example of this is his observation that there are slaves by nature and slaves by mere norms.[81] Other examples are presented in the introductory remarks to the *Politics:* man is dependent on community life,[82] the home community is a natural frame for daily life,[83] the state is 'prior'[84] to individual men and the home.[85] All these propositions are clearly based on deductions from natural law. The same can be said for his observations about men's striving after knowledge,[86] or the fact that 'imitation'[87] is natural to man, or that he who confers a benefit[88] feels more attached to the receiver than vice versa. In all of these statements we are referred to φύσις as the explanation. Our insights into what can be proved and what cannot be proved will always change. Likewise, we can never know all

80. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra,* note 3 at 117 ff.
81. Pol. 1255 a 5.
82. Pol. 1253 a 2.
83. Pol. 1252 b 13.
84. C. 14 a 26 - 14 b 22.
85. Pol. 1253 a 19.
86. M. 980 a 21.
87. Poe. 1448 b 5. "Imitation" is the usual but not the correct translation of μίμησις.
88. E.E. 1241 a 40.

the conclusions which may be deduced from propositions established by natural law as "the best." It is obvious that by accepting a certain constitution as the best, the aspects of justice and the corresponding laws inherent in such a constitution are, to a high degree, fixed by mere logic.[89] But apart from this, whatever our human shortcomings in grasping and recognizing the truth, the fact still remains that there are two kinds of justice. It is a scientific truth that a line of division may be drawn between a law that can be proved and a law that cannot be proved but which bases its validity on nothing but an act of promulgation.

There will, of course, always be doubts as to whether a proposition declared to be a natural law will stand the test. We come, e.g., across the dogma that a certain kind of war is *φύσει δίκαιον*.[90] This 'deduction' may be correct. It depends upon another proposition of natural law to the effect that there are people created to render services similar to those of animals. These people are, therefore, meant to be slaves, and if they do not realize the 'truth' of this verdict and do not accept it, then they have to be shown their actual position by way of war. One is tempted to recall a remark of Heine, that it all depends on the proof of the statement that some men are born with saddles on their back, some with spurs on their feet.

4. There remains the question: What governs the laws which may be *οὕτως ἢ ἄλλως*? Regardless of their content, once they are promulgated, they are in force. The alternative solutions which might have been promulgated are of possible historical value but otherwise insignificant. So what is the justification for the provision actually chosen and promulgated?

One possible answer is that after a specific norm has become law it is 'proved' to be "the best" according to Aristotle's meaning, i.e., the best from a moral point of view according to a scientific proof. This would mean that originally the dictum of the law was not capable of being other than as it is and, hence, the law would not be of the kind we are presently considering. Such a 'proof,' accordingly, cannot be accepted.

In the chapter on natural law in the *Nicomachean Ethics* there is a hint of an answer to our question. We are told that we make use of large weights in buying wholesale quantities and smaller weights in the retail business; this evidently is the meaning of the passage involved, written in connection with the problem of changeability.[91] This variability in the use of weights also characterizes norm-laws. Both weights and norm-laws are based on conven-

89. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra*, note 3 at 119 ff.
90. Pol. 1256 b 26.
91. E.N. 1135 a 1 ff.

tion.[92] This reference to convention is not new; that norm-laws are characterized by this notion was mentioned before. Now, however, the rules of changing weights are related to the idea of usefulness[93] as well. The link drawn at this point between norm-law and usefulness does not explain much, just as the reference to the common-best[94] gives no help. It may be difficult to see in this remark the germ of a theory on how laws should be enacted when they do not belong to the sphere of natural laws.

Usefulness and "the best" always remain in different worlds. Natural law may mean the right solution of a problem wrongly solved by existing norms; in this case the right and the wrong solutions of an identical problem confront each other. In this case the existence of two different solutions to the same problem indicate the existence of a wrong and a right (or less wrong) natural law solution. There is always an antithesis between solutions based on scientific proof and solutions based on some other principle, possibly the principle of usefulness.

As we have seen, Aristotle is dealing with questions of jurisprudence. We should not blame him if a critique of lawgiving is not included in his essay. The whole Book E of the *Nicomachean Ethics* is designed as a discussion of justice as a virtue, in the same way that courage, temperance, or friendliness, for example, is a virtue. It is only by way of an appendix that attention is transferred from the subjective factors of human behavior to the objective conditions of justice, as incorporated in laws valid for a human community.

5. If we can accept Aristotle's insight into the difference between laws which can be proved (because they concern that which is not capable of being other than it is) and laws which are merely in force (because their content is capable of being other than it is) as being a lasting achievement of our scientific knowledge, then we cannot avoid the question as to whether there is a like distinction in other spheres of human relationship such as friendship, love, worship, comradeship, and partnership. According to Aristotle *φιλία*[95] and justice refer to the same persons and to the same objects. So it might be worthwhile to analyze the term *φιλία* and to investigate various relationships between man and man other than those belonging to the category of justice.[96] We might be able to demonstrate that in all social intercourse the same distinction is present. Here, too, there are things that can be proved

92. *κατὰ συνθήκεν*. E.N. 1134 b 35.
93. *τὸ σύμφερον*. E.N. 1134 b 35.
94. Pol. 1279 b 9.
95. E.N. 1159 b 25.
96. See my book, DAS SITTLICHE VERHALTEN ZUM MITMENSCHEN, IM ANSCHLUSS AN ARISTOTELES (1958).

valid scientifically and things for which deviations from rules are to be expected. Aristotle himself limits his ideas about natural law to justice.

The difficulties, of course, would be exactly the same as we encountered before. The scientific proof is dependent on the methods of ethics. These methods are not easy to describe and are even less easy to apply. There will always be people lacking what Nietzsche calls intellectual honesty[97] who will "prove" the norms which, for reasons of their own, they wish to have enforced. In so doing they ignore the fact that since these norms could easily be quite different, their "proofs" are a matter of discretionary decision rather than conclusive evidence.

Finally, there is one highly important question which Aristotle does not consider, the question of convictions and moral judgments transmitted from generation to generation, varying from country to country and adapted to the special aspects of the epoch. When working on a problem of (real) natural law we may always start *ab ovo*. In order to find the 'best' answer, we may not — or should not — be influenced by the contemporary solutions given to the problem involved. On the other hand, if we are to find a just solution to a problem in the realm of things which can be other than they are, we should not set aside contemporary solutions. Here, what is called 'common law' guides the application and evolution of justice.

This hint may suffice. Our aim is neither to decide upon the merits of natural law itself nor upon its limits, but only to discover the ideas which are explicit or implicit in Aristotle's teachings on this topic.

IV

1. We turn now to the *Magna Moralia*. Here again we find, in the chapters dealing with the problem of justice, the term *φύσει δίκαιον*. Here the meaning of this term differs completely from that in the *Rhetoric* and the *Nicomachean Ethics*. It is neither a slogan of propaganda nor an appeal to science and scientific proof. Rather, it acquaints us with another problem, a problem presented to us unavoidably by the idea of justice, or, more exactly, by our way of practicing justice.

It might be advisable to give a translation of the key passage.[98] The sentences, as Aristotle wrote them, are often no more than mere catch phrases and must be supplemented (as shown in the brackets) in order to be fully understood.

97. *"Intellektuelle Rechtschaffenheit."*
98. M.M. 1194 b 30 - 1195 a 8.

> [What is called] justice is partly by nature, partly by statute. We must not think that [if there is anything like justice by nature at all] no change of it is feasible. [Quite generally speaking] what is by nature is [against convictions widely in vogue] liable to changes. I mean this: if we should all begin throwing with the left hand we would become ambidextrous; but even then the left hand remains the left hand, and the right hand is nevertheless superior to the left hand. You can disregard our succeeding to accomplish everything with the left in the same way as with the right hand. [So we see that in this respect we are allowed to disregard actual changes.] What is exposed to possible changes is not for this reason [already] opposed to its being by nature. Rather, when — as in most cases and for the greatest length of time — the left hand remains the left [usually that means the weaker] hand, and the right hand remains the right [usually that means the stronger] hand, then we have something that is by nature.
>
> Matters are exactly the same with justice by nature; when there are changes in consequence of our way of handling it [that is, of our way of putting justice into practice] then such a change does not transform the original law into a law 'not by nature.' It remains, rather, what it is [namely, justice by nature]. For what prevails generally is obviously justice by nature.
>
> On the other hand, what we lay down and promulgate as statutes is [no doubt] justice; but it is this only in consequence of our doing so, and we call it justice by statute, but what we are looking for [in our present treatise] is justice in the sense of public law, and this public law is based on statutes and not on nature. [Therefore, we do not include natural law in our discussions.]

In one respect this description coincides with the main thesis of the *Nicomachean Ethics:* natural law and legal law represent two different kinds of law, separated by an unbridgeable gap. Legal law is based on promulgation. According to the *Nicomachean Ethics,* there is a chance that natural law will be accepted as legal law and will accordingly be promulgated. Here in the *Magna Moralia* a promulgated natural law is itself a contradiction. This is a first indication that natural law in the *Magna Moralia* does not deal with the same problem we encountered in the *Nicomachean Ethics* and the *Rhetoric.*

In the *Magna Moralia* natural law is recognized as justice (of a certain kind) and is characterized as being in actual use, despite its incompatibility with promulgation. It is in use not here and there and from time to time, but for a certain duration of time and as an accepted rule.

At the start of the discussion we are told that the distinction between legal law and natural law is not to be found in a difference with regard to the possibility of change. We saw in the *Nicomachean Ethics* that the question of

changeability played a large part in the debates in which Aristotle participated. Whenever justice and φύσις were brought into a positive connection, one was always told that φύσις may be a cause of movement, but cannot be moved and changed itself. It is exempt from alteration. However, what is called justice based on φύσις is, like any other kind of law, given to changes, as is evident. Therefore, the expression φύσει δίκαιον cannot embody the meaning of the term φύσις; and so it is misleading to maintain that there is something like a natural law. The battle against the importance of natural law might well have been conducted in this way.

This may be the reason why, even before any serious demonstration takes place, great pains are taken in the *Magna Moralia* to straighten out this difficulty. This is done in a straightforward way: φύσις, we are told, has not the meaning of being unmoveable, at least not here in the discussion of justice and law. "What prevails generally, that is, what is based on nature" (generally, and so by nature)[99] is "what is valid in most cases and for the greatest length of time."[100] Such a change in the meaning of 'being by nature' gives us a completely different outlook and brings us face to face with new problems. These new problems are rendered even more difficult by the quite surprising remark at the end of the text, as quoted above, that natural law cannot and will not be dealt with in the *Magna Moralia*.[101] It is decisively excluded as a potential topic. Accordingly, it is not mentioned anywhere else in the *Magna Moralia*. We must be satisfied with the few remarks we have seen. But we cannot leave it at this time since the problem of natural law has been raised under such different circumstances, and also because of the declaration that natural law is 'superior' to legal law.[102]

2. Why this exclusion of natural law from the discussion in the *Magna Moralia*? Not for any reason connected with its being 'natural.' Rather, the reason is that it is not deemed to be justice at all in the meaning this term has in the *Magna Moralia*. We saw this before while discussing the *Nicomachean Ethics*. Unless a norm belongs to the sphere of justice, it cannot be a natural law. The problem of natural law lies outside the kind of specific law that is discussed in the *Magna Moralia;* and as the inquiry, we are told, is not to be extended to any outside norm, it has no place in the *Magna Moralia*.

At this point there is a decisive discrepancy between the *Magna Moralia* and the *Nicomachean Ethics*. Both books agree in that they contrast natural law and legal law. But in the *Nicomachean Ethics* natural law and legal law

99. τὸ γὰρ ὡς ἐπὶ τὸ πολὺ διαμένον τοῦτο φύσει δίκαιον προφανές. M.M. 1195 a 3.
100. ἐπὶ τὸ πολὺ καὶ τὸν πλείω χρόνον. M.M. 1194 b 35.
101. M.M. 1195 a 7.
102. βέλτιον. M.M. 1195 a 6.

are parts of public justice (*τοῦ πολιτικοῦ δικαίου*),[103] while in the *Magna Moralia* natural law and legal law are parts of justice (*τῶν δικαίων*).[104] This places natural law in one case within, in the other case without, public justice. Whether or not natural law is a part of public justice is not a superficial question. It is not merely a question of good or bad arrangement. In order to understand this we have to begin further back.

As in the *Nicomachean Ethics,*[105] the chapter on justice in the *Magna Moralia*[106] begins with the statement that there are two kinds of justice. It would be better to say that the word 'justice' has two meanings.

On the one hand the term characterizes a certain kind of behavior described as the acme of virtue.[107] The *Nicomachean Ethics*[108] goes one step further in this respect by adding the view that although it is the totality of virtue, it is such a totality only insofar as "directed towards fellowmen." It is therefore something more, or even other than, the sum of all the individual virtues. However, the *Magna Moralia* speaks only about a relationship *καθ' ἑαυτόν,*[109] as it is specific for virtue as a whole. In this way justice is confined to an amalgam of facts previously discovered in the analysis of the various virtues. This difference, however, does not matter here. The main point is that justice in this first sense is a definite attitude in our life, and this attitude is measured by conformity with, or deviation from, the *νόμος.*[110] To act in conformity with the law is to act justly;[111] to act contrary to it is to act unjustly. Considering the far-reaching meaning of *νόμος,* already mentioned above, it should not be overlooked that there is no direct connection between this kind of justice and either the ethical good called justice or legal law, judges, lawcourts and the like. Thus, in discussing natural law, consideration of a special kind of human character is of no assistance. Natural law cannot be explained as originating in human *ἕξεις.*

Another meaning of justice, recognized[112] in both works as directed *πρὸς ἕτερον,* is equality.[113] In the *Magna Moralia,* for example, it is said that justice is equality and equality is justice.[114] It may be equality of quan-

103. E.N. 1134 b 18.
104. M.M. 1194 b 30.
105. E.N. 1129 a 26.
106. M.M. 1193 b 2.
107. M.M. 1193 b 6.
108. E.N. 1129 b 26.
109. M.M. 1193 b 13.
110. M.M. 1193 b 2.
111. G. C. Armstrong, in his translation of M.M., misses the decisive point by calling *νόμος* a legal law: *νόμος,* it will be noticed, remains outside the sphere of both natural law and legal law.
112. M.M. 1193 b 19.
113. M.M. 1193 b 20.
114. M.M. 1193 b 33.

tity or of quality,[115] but it is in any case something that can be measured in a strictly mathematical sense. In this respect justice means something quite different from justice as the mark of a particular person, state of mind, or virtue. Justice in this respect is a principle, a rule, or a moral value.

It should not seem strange that, as explained in the *Magna Moralia,* and in more detail in the *Nicomachean Ethics,* the term 'justice' has a double meaning, especially if we consider that in everyday English usage it has the same double meaning. English 'justice' may mean a virtue as well as "the just" and lawful. In this respect the German language is substantially the same, since the term *'Gerechtigkeit'* can be applied both to a characteristic of any individual who is *gerecht* and to anything denoted by the noun *'Recht.'* The *Nicomachean Ethics*[116] contains the important assertion that all that is lawful (justice in the first sense) is just (justice in the second sense), while not all that is just is lawful. Such an assertion is missing in the *Magna Moralia,* yet it would not have been incompatible with the teaching of the *Magna Moralia.* It is a very helpful sentence and proves that the dividing line between the two kinds of justice is correctly drawn. To act in accordance with what the norm prescribes indicates that one has a just character; a just character, however, concerns many things other than mere conformity with specific laws. As mentioned before, the norm that directs the behavior of a man deserving the name 'just' extends beyond the limits of any law (be it by statute or by nature).

Hence we conclude that the two meanings are actually identical.[117] It is only by trying to find the meaning of 'justice' that we can hope to cope with the problem of natural law. The *νόμος,* which is the basis of the virtue of *δικαιοσύνη,* does not lead us to natural law. The *Nicomachean Ethics* contains a profound study of this virtue. The question of how it is a mean (*μεσότης*) is mentioned (but not solved).[118] For the most part the *Magna Moralia* neglects to discuss this meaning of justice and concentrates on justice as equality (*ἰσότης*). In like manner it fails to treat of the *φύσει δίκαιον,* simply because the latter is not a part of the justice understood as equality. The *Magna Moralia* concerns itself with justice only insofar as it signifies equality. When this point of view is taken, then our subject can only be justice as expressed by public law since equality is the main feature of public law.[119] In the *Magna Moralia* it is taken for granted from the beginning that justice

115. *ἀναλογία.* M.M. 1193 a 6, 1193 b 37.
116. E.N. 1130 b 11.
117. C. 1 a 1.
118. E.N. 1108 b 9, 1129 a 4.
119. M.M. 1194 b 9.

is only public justice (*τὸ πολιτικὸν δίκαιον*).[120] Justice is what in the *πολιτική κοινονία*[121] keeps the community together,[122] provided the community is understood as a community of equals.

3. We encounter not only the term *ἰσότης* in these sentences, but also another expression for equality, *ὁμοιότης*, which may best be translated as 'parity.' "Citizens are joined together by some kind of community; they must have parity in relation to one another, although they are *de facto* different."[123] This sentence, striking in itself, is further complicated by the fact that here we encounter the *φύσις* again. The complete sentence can be read as an imperative: Citizens, strive after parity! What does *φύσις* mean in this connection?

There is another reference to *φύσις* in the *Magna Moralia*. Perhaps we can find a guide there. The passage in question[124] deals with the ethical problem of temperance and intemperance. The man who is unrestrained is characterized as bad by nature.[125] Evidently the meaning here is that the man is born bad and his bad character cannot be overcome, whereas acquired habits may undergo a change for the better. Here the natural (*φύσις*) is contrasted with the habitual (*τρόπος*) by associating unchangeability with the former. However, this meaning of *φύσις* cannot explain why parity should be related to it. Parity is clearly not something static like the restraint of the temperate man. Rather, it is the goal of our endeavor. People do not have parity. They want it; they all seek it. So we find no help here.

And so we can assume that in this connection the word *φύσις* means the same as in the passage about natural law, appearing after the argument that no other justice than *δίκαιον πολιτικὸν* manifests equality in its pure sense.[126] Equality in its meaning of "parity based on nature" is a reality even though people recognize their actual inequality. It signifies an equality that is as a matter of fact practiced. It is not created, but is acknowledged by the lawgiver (or refused by him). One is tempted to treat nature's impulse to develop equality into parity as a moral claim. However, Aristotle does not treat nature in this manner, and for him parity, though not fully realized, is a basic fact of life.

4. Accordingly, we come back to the question: Why is natural law elimi-

120. M.M. 1194 b 8.
121. M.M. 1194 b 28.
122. M.M. 1194 a 18.
123. *κοινονοὶ οἱ πολῖται τινες, καὶ ὅμοιοι βούλονται εἶναι τῇ φύσει, τῷ δὲ τρόπῳ ἕτεροι.* M.M. 1194 b 9 ff.
124. M.M. 1203 b 24 ff.
125. M.M. 1203 b 23.
126. M.M. 1194 b 29.

nated from further discussion in the chapter on justice in the *Magna Moralia?*

We see that people speak about justice in the context of relationships between father and son, master and slave, husband and wife.[127] Later on the *Magna Moralia* includes,[128] among others, the relationship between citizen and non-citizen. These relationships, we are told, do not truly involve justice. When the term 'justice' is used in speaking of these relationships its meaning is not the same as it is in other connections.[129] When discussing justice in a scientific manner, the discussing should be confined to public law. The reasons given for the lack of equity in the various cases are, no doubt, interesting from a sociological or historical point of view, but we cannot deal with them here. Thus the term 'equality' is not univocal. Father and son, master and slave, husband and wife are not equals. We have here what the *Magna Moralia* leaves without a special name and is called in the *Nicomachean Ethics* δίκαιον καθ' ὁμοιότητα,[130] i.e., a kind of quasi-justice which is extensively dealt with in the *Politics*.[131] Even in the *Magna Moralia* the use of the expression δίκαιόν τι[132] shows that, even though the word 'justice' might not be proper, the relationship in question cannot be described or interpreted adequately without employing the idea of justice. This is confirmed by the fact that in varying degrees these relationships approach that which should be called justice. The relationship between husband and wife is nearer to it than the other ones.[133]

We now see that these matters in the area of quasi-justice, which are beyond the area of justice itself, are dealt with by that 'kind' of justice called natural justice. Natural law has a quite specific reality. It is not recognized as justice, but it occupies, in an effective way, an area that would otherwise be void of rules and norms.

Natural law covers the relationship of people who are, by the lack of parity and therefore of equality, excluded from the blessings and the protection of justice. There is no hint that such a replacement is natural in the sense in which the innate qualities or privileges of human beings are natural. Natural law, as described in the *Magna Moralia,* does not result from any moral claims. It denotes actual customs that govern certain relationships between people in a way very similar to that in which justice reigns. These customs must have been in active use as a general rule for a certain amount of time.

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127. M.M. 1194 b 5 ff.
128. M.M. 1211 a 8.
129. M.M. 1194 b 6.
130. E.N. 1134 a 30.
131. Cf. Chapter III and note 96, *supra.*
132. M.M. 1194 b 5.
133. M.M. 1194 b 25.

It is essential to realize that natural law (according to the *Magna Moralia*) is not common law (in the meaning this term has in England). It is not a right founded upon custom, and it is no *Gewohnheitsrecht*. Whenever such a common law is recognized as being on equal footing with promulgated law, it derives its validity, as does natural law, from actual practice over a given period of time when everybody concerned believes and trusts it to be legal law (e.g., right of way). Its validity is not based on moral or natural hypotheses. Such a common law does not increase the circle of civic peers, nor does it create a new kind of justice. The distinction in the *Magna Moralia* between natural law and legal law parallels the distinction in Roman law[134] between *ius civile* and *ius gentium*. Although the two pairs of terms are not identical in meaning, yet the comparison clarifies the distinction in the *Magna Moralia*. However, the *πολιτικὸν δίκαιον* excludes non-citizens in the same way as *ius civile* does. This means that there are certain groups in the population who are in commercial contact and who, therefore, seek protection as a 'natural' consequence of this living together. In both cases it is some kind of lack of legal provisions concerning non-citizens that has given rise to the tendency to create an analogue to the law that excludes non-citizens. The analogue is based upon the actual conduct of the members of the community over a given period of time.

Certain groups of people are not considered as fully participating in the existing legal order. If this is true, then the same is true of certain problems and certain questions that are not yet ready for final legislation. The reason all members of the community are not treated as equals is that, for the time being, no way can be found to extend equality to them in certain isolated areas such as housing, job opportunities, or social activities. Here, too, we see life being regulated by certain rules of behavior, valid for the greater number of cases involved during an extended period of time. These rules are accepted without any effort being made to find out the legal aspects of the situation. Finally, however, the concept of justice is brought to bear on these problems, and previous methods of treating them are, after examination, accepted or rejected.

These considerations lead us to regard the question of equality as the fundamental problem of justice. The way this problem is solved in the totality of the applicable norms reveals the stand we take towards the actual inequality of men. It should be the aim of our rational thinking to extend equality to all men in order to bring about what is 'just.' It is the tragedy[135] of justice to destroy to a certain extent the individuality of its subjects when its only

134. See, for instance, SOHM-MITTEIS-WENGER, INSTITUTIONEN 64 ff; VOGT, 1 DIE LEHRE VOM IUS NATURALE, AEQUUM ET BONUM UND IUS GENTIUM DER RÖMER 198.
135. See my DAS RECHT ALS IDEE UND ALS SATZUNG 31 (1929).

purpose is to serve these subjects. Natural law is the eternal doubt hovering over any solution that is given effect at a given time; but not more than a doubt.

On the other hand, we might ask if the fact that there are certain rules in actual use which are distinct from specific laws proves that these rules ought to be accepted as laws. Is the very existence of natural law (in the meaning of the *Magna Moralia*) enough to vindicate its transition into legal law? Certainly not. But we may ask if this potentiality of the natural law is the reason why it is called better (*βέλτιον*)[136] when compared with the statute law.

One is not persuaded by this argument. It would be hard to understand why in a treatise on ethics the 'better' law should be excluded from any discussion. It is more to the point, however, to consider that a few lines earlier[137] we find the same word ('better'), and it is not used here to make a moral judgment. The right hand, despite the possibility of the equal usefulness of the left hand, remains *βέλτιον*, and this "by nature" (*φύσει*). The meaning can only be that the right hand is, as a rule, and not only for a limited time of our experience, more apt, more serviceable, more fit to do what we are aiming at when using our hands. Suppose, as is highly probable, *βέλτιον* has the same meaning in both places. Then the meaning would be that natural law serves better the task of justice as a whole; it is capable of answering questions that are unavoidable in our social life, but are beyond the capacity of justice if we adhere only to our public laws. In a primitive society, natural law would cover our needs; in an advanced state of civilization legal law is inadequate as soon as it makes limiting suppositions.

The term 'equity' appears in the *Magna Moralia*.[138] This idea of equity, however, is not related to the problem of natural law as it is there understood. In similar lines in the *Nicomachean Ethics*[139] we learn how and under what conditions a man should be satisfied with less than what is due to him from a legal point of view.

V

We may sum up as follows. The *Rhetoric* gives a vivid picture of the popular opinions about natural law and its undeniable charm. We learn what might be said in favor of as well as against natural law. No judgment is passed on natural law, and its moral value is not compared with that of the

136. M.M. 1195 a 6.
137. M.M. 1194 b 36.
138. M.M. 1198 b 24 ff.
139. E.N. 1138 a 1.

law we encounter in daily life. Both the *Magna Moralia* and the *Nicomachean Ethics* go deeper than this. They reveal a very serious problem hidden behind a slogan. It might have been a temptation to build a theory starting from one of the meanings[140] of the term φύσις; but both works face the facts presented by the experiences of our daily life and try to analyze them. They differ fundamentally in the way they do this.

The *Magna Moralia* recognizes natural law as a permanent assault on a law which is in danger of becoming satisfied with the *status quo*. However, the *Magna Moralia* does not attempt to establish a dogma capable of leading to a concise doctrine of justice. Rather, it seeks to stimulate the confirmation of answers that might be given to vital questions.

The *Nicomachean Ethics* cuts through the uncertainty innate in the term. It surpasses the *Magna Moralia* in relating the isolated problem to the roots of philosophical thought. We are asked to rely on nothing but scientific proof when accepting a proposition as based on natural law. Otherwise we are to take the problem out of the purview of natural law. It is no small accomplishment to grasp the importance of the fact that we argue a great deal about things that may be οὕτως ἢ ἄλλως. We often do not realize that the 'right' answer to some questions cannot be proved in the way a thesis of science or morals can be proved.

When we see the problems in this perspective, we become aware that the "a priori" of justice is "prior" to the problem of natural law. The "a priori" of justice deals with the conditions that must be met by rules — whether or not they appear as laws or whether they appear as natural or legal laws — if they are to be called rules of justice. The problem of natural law is extremely complex. Aristotle's teachings provide us with significant answers; they leave us also with a better understanding of the magnitude of the problem.

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140. M. 1014 b 17 ff.

NOTES

THE POSTWAR NATURAL LAW REVIVAL AND ITS OUTCOME

For the past two years or so the discussion of natural law has been losing greatly in momentum. After World War II the number of books and essays in periodicals, particularly in Germany and Austria, concerned with this discussion was immense. At present not a few opponents to any natural law idea, positivists, think the hour is at hand for striking back. It seems, therefore, opportune to review the various lines of development in this discussion. To do so by referring to the many authors taking part in it and the details of their arguments would fill a large volume. The present writer hopes to deal with the whole discussion in the not too distant future in connection with his *Social Ethics*. Only a few general lines on which the discussion developed and which point to fields of further investigation for the natural law student, may here be briefly reviewed.

It would be a grave mistake to assume that the traditional natural law doctrine emerged without any need to re-examine its positions and, in consequence, to restate its fundamentals. For undoubtedly some progress of the human mind in coming to grips with the problems involved must have ensued from such a long and exacting discussion. Incidentally, St. Thomas (I-II, q. 97, art. 1 and 2) is very definite in his suggestion that, in general, progress of such a kind is "natural" to the human mind. Of course, when traditional natural law doctrine is mentioned in this essay, it is the doctrine rooted in Plato, Aristotle, Augustine, Thomas, Suarez, Vitoria.

Let us, however, first follow up the lines of thinking which have developed outside traditional natural law doctrine, either in concurrence with some essential features of it or in radical disagreement. The main points of view to be mentioned are the ethical, psychological, ontological, historical, sociological, theological.

A very large proportion of juristic thinking, which is prepared to accept natural law in principle, tends to restrict it to the ethical sphere. All law, according to this theory, rests ultimately on a moral basis; moral principles, including those linked with religious beliefs, are in no way to be separated from law; yet natural law and its principles of justice belong only to the realm of morality (the *ethicizing* of natural law) and not to that of law (*ius*) itself. With the traditional natural law doctrine, however, the ethical side of natural law and the metaphysical side which is linked with man's essential nature, are inseparably connected: the law of nature is to be understood as moral reason, but not to be restricted to its moral and jural principles. It consists of an order of conduct determined ontologically by human nature as a whole and thus not only by subjective insight but equally by objective fact.

On the other hand, there are attempts to derive from the ontological order

in human nature a kind of system of norms (the *ontologizing* of natural law). The argument moves from exactly the opposite point of view to that of the rationalist natural law theory which sought to derive a normative system from pure reason. In contradistinction to one-sided ontological arguing, the jurist is no doubt right when he thinks of natural law first and foremost in terms of norms of law, or general principles of law, and when he asks about their kind and source, as well as about the nature and form of their authority. He wants to know about the formation of law (lawgiver) as well as its administration (judge). Indeed, he is then largely in line with those exponents of traditional natural law theory who proceeded from the self-evident general principles or norms of the human conscience (*synderesis* as the core of *lex naturalis*) and referred to the *suum cuique* as the supreme principle in natural law (*ius naturale*).

Other thinkers, in reconsidering the natural law idea, look for points of support in the philosophy of value. Directly evident values, principles of value, ideals of value are used to establish standards for judging the existing law and goals for the further development of existing law. As a matter of fact, so far as general value principles are in question, they are akin to, if not identical with, the self-evident, intuitively grasped moral and legal principles of which traditional natural law theory speaks. But when value philosophy and value ethics exclude reason from the comprehension of values and of the order of values and ascribe it to feeling (the *psychologizing* of natural law), no link can be seen between value (*bonum, justum*) and being (*esse*). What, then, is the objective criterion for determining which values are the true values — values either in terms of a general value theory or in the light of a particular social or historical reality? No wonder that some authors come to the conclusion that the values found in the value pattern of natural law doctrine are only those valid in Western society.

On the other hand, it seems understandable that juristic thinking is today focused especially on the historical legal reality. In the light of our present historical knowledge of the varieties of legal systems and legal customs jurists view with reserve the notion of invariable legal norms. And not a few try to establish theories according to which all law represents merely a product of evolution (the *historicizing* of natural law). For some jurists the underlying idea of an evolutionary process includes the assumption that human reason is in itself only a product of evolution of the animal mind.

Others attempt to understand the natural law idea merely as an expression of social forces, and at the same time as an ideological motive factor in the evolution of social systems (the *sociologizing* of natural law). Supporters of this purely sociological interpretation of natural law are confronted with the question of the basic assumption from which to reconcile its two contradictory hypotheses: first, that the idea of natural justice is supposed to be an invention of ruling groups to support the legal order favorable to their interests; second, that it is supposed to be an invention of oppressed groups in society in the process of their efforts to secure a social order in accordance with their own interests.

The reducing of all law to historical and sociological elements could not but result in the endeavor to explain law exclusively in terms of power or expediency and to eliminate the idea of the suprahuman lawgiver (the *secularizing* of

natural law). All secularized natural law theory finds itself fraught with the difficulty of explaining the moral-jural conscience. For it is today commonly held among jurists that positive law is not as a rule obeyed out of fear of punishment but that the mainspring of obedience is man's conscience. No ethical skepticism has as yet succeeded in showing that the moral conscience with its knowledge of original human rights, rooted in man's moral responsibilities, is merely a self-deception of the human mind.

The jurist who shares the Christian outlook will unreservedly recognize the divine lawgiver as the ultimate source and sanctioning power of natural law. On the other hand, the approach to natural law is made more difficult to those who are remote from Christian belief if natural law is interpreted in terms of revealed truth (the *theologizing* of natural law) instead of natural reason, especially as the jurist is accustomed to seeing reason at work in an exemplary fashion in the great legal system which to a great extent has undeniably helped to form our legal systems and legal thinking up to the present day, namely, the Roman. There is certainly no real objection to a "theology" of natural law which lays open a rich fund of problems of an anthropological, metaphysical, epistemological, and methodological character. But it seems indisputable that less today than ever before the "philosophical" investigation into, and establishing of, natural law should be questioned as the central task of natural law theory. It is certainly not by chance that Thomas Aquinas, having the best of the Middle Ages with him, in spite of the prevailing uniform Christian outlook, treated natural law theory *philosophically,* and that he does so in his *Summa Theologiae.*

During the years of new approaches to its subject matter, traditional natural law doctrine, to be sure, has been able to hold its own, at least as far as its fundamental positions are in question. At the same time it cannot be denied that, as a result of points raised in the course of these efforts, it is now faced with a widespread array of problems.

First of all, there is the *anthropological question.* Of course, the anthropology centering on the idea of the "animal rationale" still stands. But the schools of biological, evolutionary, historical, sociological, psychological, ethnological anthropology have broken so much new ground that natural law doctrine will have to show in much greater detail how its metaphysical anthropology fits in with indisputable empirical facts. Comparatively, the medieval natural law school had knowledge only of a very narrow range of empirical facts. Since then we have learned that mankind has existed at least half a million years, that the very highly developed ancient civilizations never approached scientifically the problem of natural law, that innumerable peoples and tribes are guided by codes of law or rules of custom which, prima facie, seem very difficult to fit into the medieval natural law doctrine. (One such highly developed civilization with a very old tradition faced me with this problem when I had to write a foreword to the Japanese edition of *Social Ethics.*) The student of natural law with the present-day knowledge of facts will feel it is inconsistent simply to say "the barbarians do not use rational laws" (I-II, q. 97, art. 1) when the fundamental principles of the good and the right are thought to belong to the *lumen naturale* and this to man as *animal rationale.*

This and a number of other problems raised by the discussion in question seem to call for a further probing into the epistemological *problem of knowledge* with regard to natural law principles. The task will be twofold. It concerns the individual's knowledge and scientific knowledge. With regard to the first: How far does the general maxim apply, *omnis cognitio incipit a sensibus,* and how far will it have to be used in ascertaining the concrete contents of the self-evident principles? With regard to the second: What is the logical nature of these principles — are they purely analytical in character? Both these questions are the more urgent today as analytical philosophy and linguistic analysis try to show that those principles are either empty tautologies, propositions without any concrete contents, or value judgments about which any discussions in terms of scientific language is impossible.

Closely connected with the problem of knowledge is the problem of the *actuality of natural law,* now not considered as a rule of reason but as a factor in the legal and social systems, notwithstanding the grave aberrations to be found in them. Some schools of Protestant social ethics have an easy solution: there is *post lapsum* no such thing as an order of society recognizable as preordained in human nature and, in consequence, no reality of natural law in operation; we are, this school insists, exclusively dependent on theological anthropology and on theological ethics, which in turn are dependent solely on revelation; hence, the conclusion runs, the reality of natural law is no real problem at all.

There is the further problem, how far, if at all, natural law can be made inoperative in *positive law.* It is of significance in view of the present-day totalitarian states with populations of 200 to 600 millions, the latter number referring to China with its civilization going back beyond the first millennium B.C. It is particularly important, however, to realize that natural law in operation will have to be studied with a view to the long-standing antagonism between the natural law school and the positive law school in Western societies, in order to turn it into a mutually fruitful discussion in the search for truth. Such endeavors seem further necessary in order to meet the schools of legal thinking which try to establish the idea of a multitude and variety of patterns of original natural law which are operative, they suggest, in the national systems of law or customs.

Only one more problem may be mentioned, that of *demonstrating* natural law. Three ways seem to be open. First, the empirical-historical way. It was attempted by Viktor von Cathrein in his three volumes (1910), *The Unity of Moral Consciousness in Mankind.* Since then an enormous amount of fresh material has been collected in ethnology and empirical anthropology, but the effort of Cathrein has as yet found no continuation. The second way is metaphysical-theological. Of course, natural theology is meant. It will have to be much more elaborate than it appears to be in the textbooks. If one thinks of the prolonged exposition of *lex naturalis* and *ius naturale* in Suarez, and of the various endeavors of St. Augustine to demonstrate philosophically the *lex aeterna,* which is today simply referred to as a standing idea, then there seems no doubt that a good deal will have to be done by the traditional natural law doctrine to catch up with the endeavors of those two great exponents, as well as to deal with the implications

of the two ideas of *lex naturalis* and *ius naturale,* in the perspectives in which they present themselves to the modern mind.

Particularly the *concept of "natural law"* (*lex naturalis*) has for modern science a very definite meaning, one that was altogether alien to medieval thinking. In medieval thinking the idea of natural law was restricted to the moral world. The modern concept refers, roughly speaking, to forces immanent in the nature of beings and operative in a constant manner. This, then, could be called the third way of demonstrating natural law. St. Thomas would have been the first to inquire into the necessity of adapting the traditional natural law idea to the modern concept. Indeed, there are features in his exposition of *lex naturalis* which seem to invite such adaptation. This would, I think, mean laying more emphasis on the forces and impulses in human nature, urging to the attainment of fully human existence and operating first of all through the family. Man is in the first place neither a political (related to the state) nor an individual being but a family being. For man the family is by far the most important, indeed absolutely indispensable group, if he is to grow into true human existence. Thus the present-day problems apparently point to a central idea of natural law doctrine, though one of a more modern origin (Leo XIII), namely, to the idea that the family is the cell of society, biologically, psychologically, morally, economically, culturally, and not less ontologically and metaphysically. The concept of man as ready-made *animal rationale* may well prove to be too much of a simplification. Too often he lives as such in the textbooks fundamentally as an individual, who also has social obligations; whereas man is by nature, i.e., ontologically and metaphysically, as much a social being as he is an individual being. Even the *lumen naturale,* and especially moral insight, are not inborn, but are dispositions of *nature* to be developed by *nurture* into the faculties by which the *animal rationale* can do what he is ordained to do.

The postwar natural law discussion has been focused on the fundamental natural law *principles,* their logical and epistemological character, their psychological and historical origin, their ontological and metaphysical foundation, their political and social validity, and all this in very general terms. Thus it has been occupied with problems which St. Thomas thought should not be so much in vogue, since the fundamentals of natural law, namely, its general principles, were, he thought, established and were familiar to the human mind. He was thinking in a period of development of the human mind when he was fully entitled to such assumptions. In a secularized world the situation is different. On the other hand, what he thought to be the chief task will still have to be the main pursuit of the traditional natural law doctrine: the *application* of the natural law principles to the changing world in the political, social, economic, cultural field. The fact that the postwar interest in the fundamentals or in mere generalities is abating indicates, it seems, that Thomas was right in thinking that natural law doctrine is above all a practical, not a speculative science. Accordingly it would not seem to comply with his idea of natural law doctrine if now, after the postwar discussion, it fell back to a one-sided occupation with general principles.

JOHANNES MESSNER

THE ROLE OF NATURAL LAW IN THE LEGAL DECISIONS OF THE GERMAN FEDERAL REPUBLIC

The concept of natural law, understood in its broadest sense as a suprapositive claim upon positive justice, has a special significance for Germany. For it is a basic fact about German jurisprudence that it is *not* primarily determined by *traditional* elements, such as those that play so large a role in England, even in the judicial process. Instead, German legal thinking tends to conceive of law and justice as a logical *system*.

This tendency as such is neither good nor bad, but is a simple fact or, better, an intellectual attitude. It does, however, carry with it certain advantages, as well as perils. Thinking primarily in terms of a system makes it possible to make a fresh start at any given moment by merely altering the specific (material) content or, perhaps, the point of departure — something that cannot be done on short notice within the framework of a jurisprudence determined by a deeply ingrained tradition. Whether this freedom for spontaneous initiative is good or bad depends upon whether the initiative taken is itself good or bad. Thus, from the point of view of legal thinking, the important question is whether the actual legal system, as it is enforced, bears a moral character or not.

I. Period Prior to the Bonn Constitution

The systematic and systematizing tendency in German legal thought happened to come to fruition, unfortunately, in an epoch when German thinking in general was irresistibly drawn towards materialism — the epoch least suited to visualizing and comprehending the higher (suprapositive) legal orders. To be sure, the very idea of thinking in terms of system has already introduced a revolutionary element in the ease with which a new approach may be selected without regard for any binding precedent. Theoretically, however, it would be possible to take tradition itself as the starting point of the system, using the system, as it were, as the means of unfolding and developing what is implicit in the tradition. This actually happened during the Middle Ages, when the Scholastics elaborated the spiritual and thereby the legal foundations of the Holy Roman Empire into a system, while yet keeping the classic Christian tradition in mind as their point of departure.

Modern systematic thought, on the other hand, took a militant stand both against tradition as such and against the particular tradition of the medieval state with its theologico-philosophical foundations. The theories of the modern European state, needless to say, were essentially of a militant character. Applied to the domain of law, especially to the notion of territorial or national law, this meant that the new state created its own legal system, and that the concept of *sovereignty* became the cornerstone of all legal thought. This concept, taken as a legal postulate, proclaimed first of all that the sovereign territorial ruler recognized no authority above his own, and in particular that he completely

emancipated himself from the universal claims of Emperor and Pope.[1] His claim to complete independence rested upon an actual or asserted physical power of defending this independence whenever and wherever necessary, as well as upon his readiness to employ this power at his own discretion. Herein lay the connection between modern voluntaristic notions of individualism and the modern theory concerning the foundations of the state. But since, as a rule, only the low and egoistical aspects of this individualism are identified with the sovereign, and, at the same time, through the novel concept of sovereignty, act as a point of departure for the whole legal system, the basic character of the modern state itself is of necessity egoistical — one in which rule by force is a predominant ingredient. Such a state is not declaratory of a moral order — that had been the aim of the medieval concept of the body politic — but is arbitrary power based on crude self-interest. Since the essence of the state is conceived of as the assertion of its physical prowess, this power in a Machiavellian sense, which makes its own interests the final standard or criterion of all action, strives above all to assert itself in the name of "freedom" as against the outside world, and to expand wherever possible in the name of "greatness."

This is not the place to investigate in detail the development of the modern concept of the state or the particular philosophy of law which it engendered. But it is necessary to hint at this development at least as far as natural law is concerned. In this connection, it is decisive to note that the spirit of the Enlightenment, of which the concept of sovereignty is only a political and legal expression, degenerated in the course of the nineteenth century into a materialistic and thereby more and more coarse way of thinking. As a result, legal thinkers lost the inner power even to visualize the possibility of an archetypal and morally binding ideal of justice above the positive legal order. With all its deficiencies, the medieval concept of order did at least assume as well as recognize as its logical presupposition a higher form of justice, namely, the notion of a natural and divine right. The late nineteenth century in its materialistic and voluntaristic tendencies, on the other hand, concurred with Rudolf von Jhering that law is but the "child of power."[2]

According to this new positivistic jurisprudence, the legislator, and he alone, *creates* the law. Everything prior to legislative enactment is at best "custom," but never true law. Thus, law and right became wholly identified, and bare "legality" takes the place of substantive justice as an ideal. The concept of a politically organized society or state under the rule of law (*Rechtsstaat*) now comes to signify merely an "organization in which the positive law is supreme and binding upon the executive and judicial branches of government."

This approach to law was propounded during the time of the German Empire (1871-1918). Advanced by a generation of influential jurists such as Gerber, Laband, and G. Jellinek, it was congenial to the spirit of the age and, hence, was hardly questioned. Rudolf Stammler, to be sure, in numerous publica-

1. See Freiherr von der Heydte, Die Geburtsstunde des Souveränen Staates (1952); Ernst von Hippel, 1 Geschichte der Staatsphilosophie 337 ff. (2nd ed., 1958).

2. Ernst von Hippel, 2 Geschichte der Staatsphilosophie 278 ff. (2nd ed., 1958); Der Rechtsgedanke in der Geschichte (1955), and the bibliography mentioned there.

tions, pointed out that it was well-nigh impossible to determine what the positive law is in a given case without a valid theory of law and right which recognizes the existence of rights prior to the state. But since the concept of a "just law" which he proposed failed to establish any concrete limits to the sovereignty or powers of the state, it was a concept with no practical or workable significance, and, therefore, one which raised merely a theoretical problem of legal method. The view which held that right and law are wholly identical — a view which had already abolished the old theory of the right to resist actions of the state — excluded the very possibility of any right against the law. Because of its voluntaristic origin, the new concept of sovereignty in fact granted the legislator unlimited powers. It was hoped, however — and this not without justification in this period of "conservative decency" — that the legislator would not misuse his legislative omnipotence to the detriment of the citizen. For this was a "liberal" age in which the citizen was wont to secure for himself certain freedoms from executive interference within an already sparse framework of laws.

Thus, natural law did not become a factor in the *legal decisions* of the Imperial period. As a matter of fact, since healthy common sense and the guarantee of freedom seemed embodied in the laws themselves, natural law and natural rights were not considered necessary prerequisites of justice. Only peripherally, in some isolated instances, can we find a vague reference to supra-positivistic considerations of law and right. The Supreme Court of Germany (*Reichsgericht*), for instance, held, in a decision having to do with the photographing of Bismarck's body against the declared wishes of his next of kin, that it was "inconsistent with the natural feeling of right" that what had been "secured through such an illegal action" should remain in the possession of the securer. (December 28, 1899)[3] In a later decision, the loyalty which every citizen owes his homeland is called a principle of the natural law.[4] Furthermore, there is an implicit transcendence of mere positivistic thinking in the theory of "supralegal distress," which the court developed in its criminal decisions. During this particular period natural law was also to be found, though on a subconscious level, in the domain of statutory interpretation. The legislator himself made this possible, if not necessary, especially when he set up such general standards of "good faith" (*Treu und Glauben*) or "good morals" (*gute Sitten*), thus declaring moral norms of behavior legally authoritative. To this day certain decisions are based on the definition of the Supreme Court of the Empire, defining "good morals" as "that which accords with the predominant moral sense of the people — with the sense of decency and propriety entertained by all just and right-thinking individuals."[5] This is a clear, though indirect, appeal to objective moral criteria. For obviously experience alone will not divulge whether someone is just and right-thinking; rather, previous knowledge of what constitutes justice and right thought is required to define a just and right-thinking individual.

Natural law as such remained alien to the Weimar Constitution (1918-1933)

3. 45 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereafter cited as RGZ) 170 (1899).
4. 62 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN (hereafter cited as RGSt) 67.
5. 48 RGZ 124 (1901); 80 RGZ 221 (1912).

as well, although certain isolated principles of the natural law did enjoy the status of constitutional provisions or guarantees. But the guarantees thus accorded these general principles of justice were of limited value. The Constitution itself could be changed at any time, and it was a regular practice to enact unconstitutional laws. The President could, under certain circumstances, abrogate basic constitutional rights by virtue of Art. 48 of the Constitution itself. But the greatest obstacle to the recognition of natural law was the doctrine of positivism which equated right and might to begin with and, hence, assigned to the legislator full discretion as to the detailed content or provisions of the law, to the point of injustice, indeed to the point of complete, high-handed arbitrariness. A decision of the Supreme Court of the Reich of November 4, 1927, makes this fully clear: "The legislator is absolutely autocratic, and bound by no limits save those he has set for himself either in the constitution or in some other laws."[6] Two years later the Supreme Court refused to consider whether a law was compatible with supralegal standards.[7] But that the refusal in the latter case was couched in terms not of lack of jurisdiction, but of lack of power (*Machtbefugnis*), is symptomatic of a complete surrender of legal thinking to the concepts of power politics in this period.[8] Every other organ of government, having its properly defined and delimited area of jurisdiction, may not act arbitrarily. But the legislature was presumed to be omnipotent; hence, the question of legislative arbitrariness could not properly be raised.[9]

The Supreme Court of Germany, however, did not always sustain this standpoint which is the logical consequence of the positivistic concept of law and its doctrine of sovereignty. In some decisions the Court referred to "natural" or "inalienable" rights,[10] as well as to "limitations" imposed on the lawgiver.[11] Occasionally, the validity (*Rechtmässigkeit*) of a certain statute was pointed out as debatable (*strittig*) and left open.[12]

The divorce of legal concepts from the demands of reason and morality is the direct result of the lawgiver's complete emancipation from any legal limitations on his power. Thus, during the almost total inflation, the Federal Supreme Court ruled that one paper mark was equivalent to one gold mark, since the dictionary meaning of the term "mark" seemed the only relevant issue. This decision enabled a mortgagee to pay off a substantial mortgage on his house for the price of a pair of shoes; it declared him an honest man, at least in the eyes of the law, and, at the same time, condoned his act of swindling the mortgager out of his rightful claim. These are the fateful beginnings of a way of thinking which, instead of determining legal concepts in accordance with actual facts, subjects actual facts and their determination to the sway of meaning-

6. 118 RGZ 327 (1927).
7. 125 RGZ 279 (1929).
8. "It is not within the competence of the court to decide whether laws that have been constitutionally enacted are compatible with good faith or good usage."
9. 102 RGZ 161 ff. (1921).
10. 62 RGSt 65 ff. (1928).
11. 125 RGZ 422 (1929).
12. 107 RGZ 376 (1924). Compare and contrast with the theory of arbitrary right during the Weimar period in Ernst von Hippel, *Das Richterliche Prüfungsrecht*, 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 547 ff. (ed. by Anschütz and Thoma, 1932).

less concepts — nominalistic procedures which enable present-day Soviet Russia to term tyranny democracy, to treat lies as the truth and to call the unjust just.

The inadequacy of this purely legalistic standpoint became fully obvious during the Third Reich (1933-1945), a regime which in fact it was instrumental in creating or, at least, made possible in a juristic sense. The positivistic theory which held law to be simply the expression of the sovereign will regardless of the nature of that will, made supreme the will of the Führer, and, by putting it beyond the reviewing power of any court, made it the sole fountainhead of law and right. Whenever the law may not be evaluated by the standards of justice, because no higher (suprapositive) legal orders are recognized, the legality of a disposition depends entirely on its total subjection to an arbitrary and, hence, evil will. According to an order issued in 1936 by the so-called Reichsrechtsführer (Commissar of Justice), this position, into which the adherents of positivism had maneuvered themselves and the whole community as well, is epitomized as follows: "A decision of the Führer in the express form of a law or decree may not be scrutinized by a judge. In addition, the judge is bound by any other decisions of the Führer, provided that they are clearly intended to declare law." Thus the will of the Führer and everything he proclaimed arbitrarily, came to be binding on the courts. The only debatable point was the form in which this will had been expressed. But this does not furnish any guarantee of lawfulness: the decisive criterion was simply the "unambiguous intention to determine law."

II. The Bonn Constitution

The disastrous results of a jurisprudence which ignored the moral element in the law could not be missed by the majority of jurists after the collapse of the Third Reich. Especially influential was the about-face of Gustav Radbruch — criminal lawyer, philosopher of law, and Minister of Justice during the Weimar Republic — who, because of his sincerity and the literary elegance of his writings, was one of the best-known jurists in Germany. The Third Reich had dismissed him and sentenced him to silence. Now, in an essay entitled *"Rechtsphilosophische Besinnung"*[13] (*Reappraisal of Legal Philosophy*) he came forward to renounce and denounce positivism — a Pauline conversion, for he himself had previously been among the defenders of positivist views — in these terms:

> For the soldier an order is an order; for the jurist, the law is the law. But the soldier's duty to obey an order is at an end if he knows that the order will result in a crime. But the jurist, since the last natural law men in his profession died off a hundred years or so ago, has known no such exception and no such excuse for the citizen's not submitting to the law. The law is valid simply because it is the law; and it is law if it has the power to assert itself under ordinary conditions. Such an attitude towards the law and its validity [i.e., positivism] rendered both lawyers and people impotent in the fact of even the most capricious, criminal, or cruel of laws. Ultimately, this view that only where there is power is there law [*Recht*] is nothing but an affirmation that might makes right [*Recht*]. [Actually] law [*Recht*] is the quest for justice . . . if certain laws [*Gesetze*] deliberately deny this quest for

13. Reprinted in the Rhein-Neckar Zeitung of September 12, 1945, and in Gustav Radbruch, Der Mensch im Recht 105 ff. (1957).

> justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful [*ihnen den Rechtscharakter absprechen*].

This appeal of Radbruch's is, of course, particularly addressed to the judiciary. For them it takes on especial significance, since the Bonn Constitution of May 23, 1949, has singled out the judges to be the protectors of the higher legal orders against the rules of mere positive law. Insofar as these higher principles are of divine origin, they are referred to only indirectly, in the passage of the Preamble which directs the attention of the legislator to his "responsibility before God" — a passage which, unless the basic idea of the Constitution is a lie or a blasphemy, means a recognition of the whole Christian tradition. On the other hand, the reference to natural law as a body of legally binding suprapositive principles is unmistakable when the constitution regulates the content of the positive law by acknowledging "inviolable and inalienable rights of man" which the legislator must respect at all times. Also, in Art. 1, "all public authority" (*alle staatliche Gewalt*) is enjoined always to respect and safeguard the "unimpeachable" dignity of man: the state is thus declared to exist for the sake of the higher life of man. Never may it treat man as a mere building block in its structure of egoistical power — a thing which positivism had not only permitted but actually taken as one of its logical presuppositions.

1. *The Third Reich: A Rule of Unjust Law.*—Let us attempt to analyze and systematize certain decisions which shed some light on the "legal order" of the Third Reich. We shall begin with those decisions which deny that the Third Reich had a "rule of law" in the proper sense of the term, or which declared some of its laws invalid because of their particular content. Behind these decisions is the insight, more or less distinct, that there may be a "rule of *unjust* law." Such a rule can be "in force" and thus be "legally binding" in a positivistic sense, and yet lack the true character of law: for evil can only constrain — it cannot obligate.

Thus, the appellate court (*Oberlandesgericht*) at Frankfurt in a decision of August 12, 1947, had to pass on the contention of certain physicians who had participated in "experimental killings," that they were not conscious of breaking the law (*Rechtswidrigkeit*) since their actions had been sanctioned, in fact desired, by the laws of the Third Reich. The court declared:

> Such a way of thinking would not do justice to the true character of the National Socialist "law." Law must be defined as an ordinance or precept devised in the service of justice [citing Radbruch]. Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a "lawless law [*unrichtiges Recht*]." An accused may not justify his conduct by appealing to an existing law if this law offended against certain self-evident precepts of the natural law. That is the situation here.[14]

As early as 1945 a decision of the lower court (*Amtsgericht*) in Wiesbaden held: "The laws which declared that the property of Jews had become forfeited

14. 2 SÜDDEUTSCHE JURISTEN ZEITSCHRIFT (hereafter cited as SJZ) 521 ff. (1947).

to the state" were "incompatible with natural law," and, therefore, "void at the very time of their enactment."[15] The Federal Court (*Bundesgerichtshof*) likewise reached the conclusion that an order of Hitler's issued shortly before the end of the war which made it incumbent upon every bearer of arms to shoot deserters without benefit of trial, was not binding since it offended "to an intolerable degree" against "the law of nations and of nature."[16]

In a decision of February 8, 1952, the same court addressed itself to the question "whether laws and ordinances can be considered 'law,' in the true sense of the term, if their content offends against the claims of the natural law or against the generally valid rules of conduct in the Christian Western tradition."[17]

Finally, as though in summation, a decision of the same court of February 12, 1952, points to the general invalidity of the laws of the Nazi regime:

> Those in power during the Third Reich issued numerous regulations which claimed to be "lawful" and establish "law." However, these regulations lacked the quality of laws because they violated those basic principles which are independent of the recognition of governments and stronger than any enactment by the government. Regulations issued by the government which do not even attempt to bring about true justice do not create law; and actions which conform to them remain wrong.[18]

2. *The Rejection of Legal Positivism.*—An explicit rejection of legal positivism with its confounding of lawfulness and legality can be found in a decision of the Federal Constitutional Court (*Bundesverfassungsgericht*) of October 23, 1951:[19]

> Blind adherence to the principle that the original framer of the Constitution may arrange everything to suit himself would be tantamount to a relapse into legal positivism, a way of thinking that jurists have long since abandoned, both in theory and in practice. It is not necessarily true that the original framer of the Constitution, in the very nature of things, will never overstep the absolute bounds of justice.

The same idea also underlies a *per curiam* opinion of the *Bundesgerichtshof* which rejects the positivistic theory of sovereignty:[20]

> The opposite view, advanced especially by Apelt, cannot be maintained. This view holds that the framer of the Constitution is "autonomous" in establishing a "system of values." Such a position completely denies the existence of any higher compelling standard of law and justice above the legislator. It would acknowledge as "rightful" [*rechtmässig*] a written constitution

15. 1 SJZ 36 (1946).
16. 3 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (hereafter cited as BGHZ) 106 (1951).
17. 5 BGHZ 97 (1952).
18. ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN (hereafter cited as BGHSt) 177 (1952).
19. 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (hereafter cited as BVG) 18 ff. (1952).
20. 11 BGHZ, *Appendix* 34 ff. (1953).

devised to legalize a reign of arbitrary force and thus declare it binding upon the courts. Bachoff rightly points out that such a result would be absolutely unacceptable to the German sense of justice, where the memory of "legalized wrong" [*gesetzliches Unrecht*] is still fresh.

Along with positivism itself, the positivistic method of statutory interpretation — a combination of dogmatic or empirical points of departure with what is taken for logical procedure — is rejected. A trial court (*Schwurgericht*) in Cologne declared in a case of "mercy-killing": "In the realm of natural law the intellect is supreme, and proper solutions are reached, not by following signposts, but by following a sense of moral propriety, guided by human conscience."[21]

In this connection, another court expressly acknowledged the individual's right to resist a regime of "legalized wrong."[22]

3. *Acknowledgment of Suprapositive Norms and Standards.*—The decisions mentioned above find their justification in the acknowledgment of suprapositive principles at the basis of positive law. Usually these principles are referred to as "natural law," but other terms, such as the "moral law," the "moral order," "material justice," "idea of right and justice [*Rechtsidee*]," or "general order of moral values," are used.

In particular, during the interregnum between the collapse of the Nazi regime and the founding of the new Federal Republic, the courts in their decisions were often forced to fall back on natural law.[23] Not the least important of these decisions dealt with so-called "euthanasia judgments," that is, with those acts of planned murder of "incurably" sick persons during the Third Reich by an order of Hitler's to the *Reichsleiter* Bouhler and Dr. Brandt. Also the superior court (*Landgericht*) at Bonn, in a judgment of October 20, 1947,[24] declared the right to freedom of movement as derivative from natural law. And in a decision of July 27, 1949, the *Oberlandesgericht* at Bamberg found that the *Heimtückegesetz* was grossly unfair, but did not violate natural law, since it demanded only an omission, namely silence.[25]

After the adoption of the Bonn Constitution (*Grundgesetz,* or "fundamental law"), and the postwar state constitutions, the courts made it clear that their use of suprapositive norms was not to be confined to cases in which the official acts of the Third Reich were in question. The *Schwurgericht* at Cologne, in the case already referred to, said: "Above positive law there is a higher unwritten law. A law enacted by man can make no claim to validity if it runs counter to the natural law."[26] Similarly, the Bavarian Constitutional Court (*Verfassungs-*

21. Decision of October 24, 1951, reprinted in 2 NEUE JURISTISCHE WOCHENSCHRIFT (hereafter cited as NJW) 358 (1952).
22. BVG, reported in 56 NJW 1393 (1956); and BGH, reported in 6 NJZ 1369 (1953).
23. *Amtsgericht Wiesbaden,* decision of November 13, 1945, reported in 1 SJZ 36 (1946); *Kammergericht,* decision of August 24, 1946, 2 DEUTSCHE RECHTSZEITSCHRIFT (hereafter cited as DRZ) 198 ff. (1947); *Oberlandesgericht Saarbrücken,* decision of May 21, 1947, 2 DRZ 341 ff. (1947); *Oberlandesgericht Frankfurt,* decision of August 12, 1947, 2 SJZ 621 ff. (1947); *Landgericht Köln,* decision of March 5, 1949, 3 MONATSCHRIFT FÜR DEUTSCHES RECHT (hereafter cited as MDR) 370 ff. (1949).
24. 2 MDR 153 (1948).
25. 5 DRZ 302 (1950).
26. 5 NJW 358 (1952).

gerichtshof) referred to private property as a right which precedes the state or the legal order.[27]

Since these principles precede both the state as such and positive law as such, it follows that the maker of the constitution is himself bound by them. Thus, the Federal Constitutional Court (*Bundesverfassungsgericht*) expressly declared that a constituent assembly is "bound by the suprapositive principles of justice which underlie all written law."[28] And the Bavarian Constitutional Court (*Verfassungsgerichtshof*), in a decision of June 10, 1949, held:

> A provision is not necessarily valid simply by virtue of being embodied in the Constitution itself. There are constituent principles so basic, so elementary, so very much the expression of a justice which every constitution must presuppose, that they are binding even upon the author of the constitution. Those constitutional provisions which go against these principles may actually be held invalid.[29]

Some decisions refer to "justice" rather than to "natural law," and sometimes both concepts are used simultaneously. Thus, the decision just quoted refers in one place to "natural rights belonging to all human beings, which rights precede positive law and limit the power of the state," and in another place demands of the legislator a "guiding orientation toward the ideal of justice." The *Schwurgericht* at Cologne puts the two concepts into one sentence: "For reasons of a higher justice founded on natural law. . . ."[30]

Another decision making reference to an "ideal of justice" as a guiding principle of the positive law is that of the first senate of the Federal Constitutional Court of December 18, 1953, which mentions "material justice" as contrasted with "legal certainty" and holds: "A provision of a constitution can be invalid if it disregards to an intolerable degree those postulates of justice which belong to the basic determining principle of the constitution itself."[31] Finally, "even the application of individual statutes," the court of last instance in the British Zone of Occupation (*Oberster Gerichtshof für die Britische Zone*, or OGHSt) ruled, always requires "an awareness of the fundamental principles of justice."[32]

Other decisions, instead of appealing to "natural law," refer to the "moral law" or to the "dictates of morality." Thus the Federal Supreme Court (*Bundesgerichtshof*) in a decision of February 17, 1954, declared: "The true compelling force of the law consists precisely in its correspondence with the dictates of the moral law."[33] In this fashion monogamy was declared to be in accord with the moral order.[34] And the *Schwurgericht* at Cologne announced

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27. 2 Entscheidungen des Bayrischen Verfassungsgerichtshofs, Neue Folge (II), no. 1, p. 2 (1949) (hereafter cited as Bayr. VGH).
28. Decision of October 23, 1951, 1 Bayr. VGH 17 (1952).
29. 2 Bayr. VGH, Neue Folge (II), no. 5, p. 45 (1949). Accord: decision of April 25, 1950, 3 Bayr. VGH, Neue Folge (II), no. 6, p. 29 (1950).
30. 5 NJW 358 (1952).
31. 3 BVG 225 (1953).
32. 2 Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen (hereafter cited as OGHSt) 269 ff. (1950).
33. BGH, reported in 9 Juristenzeitung (hereafter cited as JZ) 509 (1954).
34. *Ibid.*

that "[t]he question whether an act is right or wrong, that is, whether the actor has made an error in judgment and whether or not his conduct is blameworthy — all these questions can be answered only on the basis of an unwritten law, the moral law."[35]

In the decision of the *Bundesgerichtshof* of February 17, 1954 (see footnote 33), which dealt with the question of whether acts of unchastity are possible between affianced people, the moral law appears to be substantially linked with an objective moral order or order of moral values:

> The precepts of the moral law derive their validity from themselves. Their absolute compelling nature not only rests upon a given order of moral values which simply must be accepted, but is founded on a set of moral imperatives which regulate human communal life. These precepts remain in force whether or not they are obeyed by those to whom they are addressed, or even whether or not they are generally accepted. Their content and meaning does not change simply because opinions about what is right or wrong may vary.

The Supreme Court (*Oberste Landesgericht*) of Bavaria, in an opinion of November 15, 1950, defined the concept of "legal order" in such a way that it includes the "entirety of all the norms of written and unwritten law," including the suprapositive concepts of law and right.[36]

4. *The Authority of Social or Cultural Standards.*—In a number of decisions the issue was not so much the binding force of objective norms as such, as that of the special content given these norms by particular social or cultural groups. As regards this problem, the Federal Supreme Court held:

> Commands issued by the sovereign which do not even aim at bringing about justice . . . but which flagrantly ignore the rights and the dignity of the human personality *as they have been observed by all civilized peoples,* do not create law. Any act conforming to such commands is unjust and wrong. [Italics added.][37]

And in another decision:

> However wide the latitude we may allow to the state in deciding what shall be right and wrong, it still is not, and cannot be, unlimited: in the moral awareness of all civilized peoples there is, in spite of all the individual differences we may find on specific points of law, a certain core of law and justice which may not be violated by any statute or other act of the authorities.[38]

A third decision of the same court refers to a "general intuitive feeling for what is just," to an *"ordre publique"* as well as to "convictions concerning what is

35. 5 NJW 359 (1952).
36. 1 ENTSCHEIDUNGEN DES BAYRISCHEN OBERSTEN LANDESGERICHTS IN STRAFSACHEN n. 41 (1950).
37. 2 BGHSt 177 (1952). See also 2 OGHSt 272 (1950).
38. Decision of Jan. 29, 1952, 2 BGHSt 237 (1952).

right among all civilized nations."[39] Finally, the Criminal Senate of the same court, on February 12, 1952, points to the "historical tradition and practice of all civilized peoples" as well as to their "moral conviction of what is just."

Except for the whole of humanity itself, which finds its expression in the concept of natural law, the most comprehensive point of practical moral reference for a higher law and justice seems to be the notion of a single Christendom. In a way the concept of Christendom proves to be superior, or at least supplementary, to that of the natural law, because here the religious ideal takes its place beside the ideal of justice. This is illustrated in a decision of the Federal Supreme Court of February 8, 1952, which referred to "generally valid moral laws held in common by the Christian civilization of the West." Similarly, a decision of the same court of March 10, 1954, declared that "[e]very attempt at suicide — with possible exceptions in extreme cases — is condemned by the moral law, because no one may highhandedly dispose of his own life and inflict death upon himself" — a position tenable only from the standpoint of Christianity, since the Stoics, for example, considered suicide as an expression of personal freedom. Finally, in a decision already mentioned rendered by the appellate court (*Oberlandesgericht*) at Bamberg of July 27, 1949, the view is advanced that something can be forbidden simply by "divine law."

In addition to these criteria, cultural standards prevailing within the particular society are also cited as carrying moral weight. The Federal Supreme Court based the right of a man to give his name to his wife upon the "still predominant feeling in all walks of life, among people of both sexes" that the man represents the family to the outside world, and that "in the natural division of labor within marriage the family is known and referred to by the name of the male."[40] In an opinion of the *Oberlandesgericht* at Celle[41] there is reference to the "unspoiled views of the peasant population," and to "ancient well-founded tradition inherited from time immemorial." It will be noted here that the subjectivity which inheres in any reference to someone's "views" is modified by the objectivity implied in the adjective "unspoiled." This excludes the possibility of interpreting the quoted language as calling for a purely sociological and, hence, value-free criterion. Seen in this light, there is great significance in the opinion of the Federal Supreme Court[42] which prohibits the judge from deferring to the "changing opinions and customs of fluid social groupings," inasmuch as it is not always certain "whether [these opinions] are based upon any truly moral conviction, or just upon a kind of moral indifference, or perhaps upon a sense of the wrongness and 'illegality' of a concrete situation [*Ordnungswidrigkeit des Geschehen*]." Otherwise one would end up in a "meaningless and destructive relativism which knows of no other standard or guide than the social realities and, hence, remains without any moral values or value judgments."

39. 5 BGHZ 97 (1952).
40. 5 BGHZ 97 (1952).
41. 9 NJW 1158 (1956).
42. BGH, reported in 9 JZ 509 (1954).

5. *The Embodiment of Suprapositive Standards in Positive Law.*—As a further recognition of suprapositive principles of law and justice, the Bonn Constitution maintains that these principles operate both as positive, practical, and concrete criteria or norms of law and, as regards their compelling validity, as suprapositive standards of right and justice. Accordingly, the Federal Constitutional Court declared with respect to the principle that "all men are equal before the law," that this principle was "so much a part of our basic legal and constitutional order" that "one would have to refer back to this suprapositive principle itself, if the principle of equality had not expressly been written into the Constitution in Article 3."[43] Recognizing the "equality clause" as a part of the written or positive law, the court considers it at the same time as emanating from the idea of right and justice itself. [44] Similarly the Federal Supreme Court refers to the "strictly supralegal" character of Article 3 of the Bonn Constitution.[45]

6. *Freedom of the Person as a Legal Standard.*—Being primarily related to the human person, the principle of equality before the law recognizes the person as a limit as well as a norm for all legislation. Thus the concept of substantial individual freedom is strengthened by the concept of restraint imposed on all arbitrary acts by those currently in power. Legislative caprice is limited not only by objective, universally valid standards, but also by the (subjective) human person and his moral freedom. Hence, all those principles of law have suprapositive meaning which grant a freedom so essential to the true human nature that to curtail it would be violative of man's very moral substance. This being so, the provisions of the Bonn Constitution concerning human freedom are not only significant for positive law, but are actual expressions of the suprapositive constitutional principles of the rule of law itself. Also, attention should be called here once again to the "dignity of man," a paramount legal significance which expresses, as it were, the worth of the human person as an end in himself. The "elementary basic rights,"[46] according to the Bavarian Constitutional Court constitute an "insurmountable barrier" to arbitrary caprice on the part of the sovereign. For they are the "immediate expression of the human personality"[47] as well as of its worth and dignity.[48]

Among the inalienable claims that a man as such has upon the law and the legal order is that claim to a proper judicial procedure in cases where his life is at stake.[49] But such a procedure can be afforded him only where the courts enjoy fullest freedom in ascertaining the truth in order to do justice, that is, where the courts are not mere executors of commands originating outside the law. There must be a procedure calculated to "ascertain the truth," and the findings must be made by judges "independent of any command from above," and, hence, subject only to the dictates of their free and untrammelled consciences as jurists.[50]

43. 1 BVG 233 (1952).
44. 4 BVG 144 ff. (1956).
45. 11 BGHZ 34 ff. (1954).
46. 3 Bayr. VGH II, no. 14, p. 167 (1950).
47. 3 Bayr. VGH II, no. 6, p. 48 (1950).
48. 2 BGHSt 177 (1952); 2 OGHSt 2, 27 (1950).
49. 1 Verwaltungsrechtssprechung 373 (1949).
50. 2 BGHSt 175 (1952).

7. *Conclusion.*—We have seen, then, at least in outline, the impressive evidence of the vital role the natural law is playing in the current decisions of the courts of the German Federal Republic. It cannot be denied, however, that even after 1945 a number of appellate courts, particularly in northern Germany, have clung to legal positivism.[51] And there always remains the danger that after a certain state of order has been reached, the idea of a suprapositive law and justice may again be abandoned. For although it may be understandable and, in fact, in the interest of the cause, that the idea of natural law be called upon only when the necessity arises, the natural law must continue to remain constantly alive as an appeal to man's moral conscience. Viewed in this manner, Germany is already on the path back to legal positivism when the Federal Constitutional Court maintains that "legal certainty" is "an essential element of any sovereign legal order"[52] which "seeks to realize true postulates of justice." For legal certainty is not part of the *idea* of a truly just law; it is an aspect of the legal order and, hence, can be meaningful only if what it insures is justice and not injustice.

ERNST VON HIPPEL

(Translated by HENI WENKART)

51. *Oberlandesgericht Kiel,* reported in 2 SJZ 323 ff. (1947); *Landgericht Hildesheim,* reported in 3 SJZ 143 (1948); *Oberlandesgericht* [*OLG*] *Hamburg,* reported in 3 SJZ 37 (1948); *OLG Hamburg,* reported in 3 VERSICHERUNGSRECHT 112 (1952); *Oberlandesgericht Düsseldorf,* reported in 3 NJW 959 (1950).
52. 3 BVG 237 (1954).

METHODOLOGY AND VALUES IN AMERICAN LEGAL EDUCATION: SOME INTERACTIONS AND RECIPROCAL INFLUENCES

Any study of dominant trends in philosophy of law in American law schools at the present day must take note of distinctive organizational and institutional features, peculiar to the American scene and distinct from those existing in other countries, which so largely shape and condition American lawyers and law professors' attitudes to questions of values in law. For the American law school, in contrast to law schools in other countries and even those in England and most of the Commonwealth countries,[1] is a professional school, in design and in emphasis.[2] It is, of course, a graduate school, though a graduate school without any specific correlation or liaison with the program in undergraduate schools or colleges, and without therefore any continuing common core curriculum requirement for its freshmen entrants.[3] The fact that the law school is a graduate school has, however, been used as a successful argument that the law schools should purge themselves of all erstwhile liberal arts tendencies in their own curricula.[4] Legal History[5] and Roman Law in the law schools have been dead for years; Jurisprudence (Philosophy of Law) has dwindled away into a twilight option attended in the sophomore year or not at all;[6] Constitutional History, Political Science, and similar courses seem not to have been taught in the law schools in three quarters of a century. Of course, the demise of these particular subjects in the law school was undoubtedly hastened by indifferent professorial teaching and research in them: they were usually as-

1. See generally Griswold, *English and American Legal Education,* 4 THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW (New Series) 131 (1958).
2. "In the United States, legal education is dominated by a new institutional type, the professional law school. [Footnote omitted] Originating in the initial era as a proprietary substitute for apprentice preparation for legal practice, it is of interest to observe how these institutions have acquired a recognized place in the universities so as to give academic prestige to what is basically training in the trade." Yntema, *Looking Out of the Cave—Some Remarks on Comparative Legal Research,* in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 67 (Conard ed., 1955). This article by Yntema was reprinted in 54 MICHIGAN LAW REVIEW 899 (1956).
3. ". . . There has been no effective control over nonvocational prerequisites of admission to legal study. For a time, in fact, these were negligible, and the law schools actually competed with the colleges for students. Today, this has been partly remedied, and a modicum of cultural preparation is needed to enter law school or to qualify for the bar. But there is no agreement on what such preparation should be and no real disposition to look behind the high school or college diplomas to make sure that applicants are in fact qualified. The law schools automatically accept the more or less standardized products of the system of public or private instruction." *Id.* at 68-9.
4. "Reinforced by the concrete method of case study later introduced by Langdell, this vocational conception [in the American law school] *a fortiori* disclaimed responsibility either to instruct the layman in what he should know about government by law in a democracy or to consider law in the light of reason, justice, or science. Such matters were left to the colleges and universities, upon which also devolved the development of the social sciences generally." *Id.* at 68.
5. Murphy, *Legal History as a Course,* 10 JOURNAL OF LEGAL EDUCATION 79 (1957).
6. See generally Ehrenzweig, *The Teaching of Jurisprudence in the United States,* 4 JOURNAL OF LEGAL EDUCATION 117 (1951); and compare Graveson, *The Teaching of Jurisprudence in England and Wales,* 4 JOURNAL OF LEGAL EDUCATION 127 (1951).

signed to the most junior members of the faculty, who were but rarely interested in them, but this was, in itself, largely a product of the law school governors' disdain for the old pre-Langdell conception of legal practice as a liberal profession.

I do not want to yield too much to the current temptation to blame Langdell for the current "professionalism," as opposed to an erstwhile "liberalism," in the American law school, or to hold him personally responsible for "all that has gone wrong" in American legal education in recent years. He has, in this regard, even been assailed, and by one of the foremost among the American Legal Realists at that, with the charge of inculcating an ivory-tower approach, with producing an unwholesome divorcement of American legal education from the actualities of day-by-day practice.[7] Taking any sort of historically deterministic approach to American legal education it was probably inevitable, Langdell or no, that with the demands of the new industrial entrepreneur after the Civil War and especially at the turn of the century for a more efficient legal approach to technical problems of corporate organization and practice, some more rigorous and scientific system of legal education should be developed in the law schools.[8] The criticism — if criticism be warranted on the score that the law schools emphasize a narrow vocationalism — would be more fairly directed, not at Langdell, but at his latter-day disciples. In taking note of the jejune quality of American legal education at the time of, and immediately after, the Civil War — legal education, at Harvard, at the time, was, in Holmes' own words, "almost a disgrace" [9] — Langdell may be pardoned perhaps for confusing its overall quality of humanism with the sloppiness and inefficiency with which it was conducted.[10] I do not know, how-

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7. "American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell. I call him a neurotic advisedly. He was a cloistered, bookish man, and bookish, too, in a narrow sense. . . .

"His pedagogic theory reflected the man. The experience of the lawyer in his office, with clients, and in the courtroom with judges and juries, were, to Langdell, improper material for the teacher and his student. They must, he insisted, shut their eyes to such data. They must devote themselves exclusively to what was discoverable in the library. . . . The neurotic escapist character of Langdell stamped itself on the educational programs of our leading law schools." Frank, *A Plea for Lawyer-Schools,* 56 YALE LAW JOURNAL 1303, 1303-4 (1947).

8. "Fundamental change in legal education went naturally with the drift of law business and of main currents of thought in the United States after 1870. Leadership fell to the Harvard Law School through the accidents of personality; if it had not come there, some other school must shortly have taken the lead under the driving force of the times. Events now demanded of the bar knowledge and skills not within the sonorous phrases of the 'constitutional lawyer' of mid-century or the black-letter learning of the conveyancer. . . . The new problems brought a pressure for more thorough and rigorous intellectual training in the law." HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 260-1 (1950).

9. See generally Howe, *Oliver Wendell Holmes at Harvard Law School,* 70 HARVARD LAW REVIEW 401, 417-8 (1957).

10. The intellectually broadest and most varied period in American legal education seems, ironically enough, to have been the colonial period at the close of the eighteenth century — highlighted by the work of Chancellor Wythe and St. George Tucker at William and Mary, and by Kent at Columbia: "[Their work] was marked by a breadth of treatment which did not appear again in formal legal education until the 1920's. These men saw legal education as a proper part of a liberal education. Accordingly, they introduced their students and readers to a framework of general ideas in jurisprudence; and they gave them some picture of the law of nations and of constitutional law, not as a superficial adornment

ever, that Langdell's latter-day successors can be pardoned for perpetuating that error or for allowing it to be concretized further in special institutional and procedural devices that have since become the pattern for most of the law schools of the common law world. I mean here, among other things, the institution of the Law Journal with its attendant self-perpetuating skill-type, the law journal editor;[11] and I mean the case system of legal education. In a way the two are, in an American setting, inextricably intertwined. The case system, as practiced and developed in the major American law schools, is undoubtedly responsible for some of the cardinal and continuing characteristics of law journal policy and practice; just as, in its turn, the law journal system, by developing a "caste" tradition around its own numbers, has tended to produce an accepted hierarchical progression — law journal editorship, law clerkship, law professorship[12] — with a consequent reinforcement of attitudes and outlook already there.

The apogee of success in the American law school is undoubtedly election to the Law Journal board, and then subsequently election to one of the Cabinet posts (Editor-in-Chief, Articles Editor, Comment Editor, etc.) on the Journal. Some like Jerome Frank have campaigned against the Law Journal's exclusiveness;[13] others have argued whether its very success may not pose a major psychological problem of providing necessary prestige symbols for those who are not fortunate enough to secure election to the board — a lesser or second-string law

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of more bread-and-butter matters, but as necessary to a lawyer's proper grasp of his subject." HURST, *op. cit. supra,* note 8 at 258.

Some elements of this academic liberalism seem to have survived, together with an extraordinary element of student indiscipline and laxness, at the Harvard Law School in the era of Parker, Washburn, and Parsons, immediately preceding Langdell's appointment as Dean in 1870. Howe, *Oliver Wendell Holmes at Harvard Law School,* 70 HARVARD LAW REVIEW 401 (1957); HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 176 *et. seq.* (1957). Langdell, however, "ruthlessly sheared off such faint beginnings as his predecessors had made in political and economic studies allied to law." HURST, *op. cit. supra,* note 8 at 263.

11. "[Law] is not kept esoteric vis-à-vis the student who, after a year, can become a law review editor, which involves sometimes editing his professors (even reviewing his casebooks, the only 'books' the professor is apt to 'write') or taking issue with them in student notes and comments on recent decisions. There are some 150 law reviews, often subsidized by the school as part of its public-relations work or as due its image of itself, and of course often also guided by the faculty. But there is, so far as I know, nothing comparable to this development in the graduate school, despite the frequently lesser professionalization of the latter (or perhaps because of this). . . . Graduate students do not run the social science (or humanities) periodicals and lack the confident impetus this involves. Law-review and other law students more than compensate for the lacunae of their teachers by educating each other." Riesman, *Law and Sociology: Recruitment, Training and Colleagueship,* 9 STANFORD LAW REVIEW 643, 648 (1957).

12. "I know the power of the system, because I made a quixotic effort to overthrow it when I was a student at Harvard Law School: I sought to persuade Professor Felix Frankfurter and other faculty men to send to the various judgeships of which Harvard held the clerkship patronage, gifted students who were not law-review men. I got nowhere: if the students were good, they would be on the law review." *Id.* at 649.

13. Thus, as a visiting member of the Yale Law School faculty, Judge Frank used to inveigh against what he regarded as an excessive concentration of student energies on the Law Journal to the exclusion of the Legal Aid Society, Barristers' Union, and other activities less pre-occupied with (in Frank's own term) "appellate-court-itis." McWhinney [Book Review], 33 INDIANA LAW JOURNAL 111, 113 (1957).

journal (intramural law review)[14] for those who do not make the first division. But none can deny the law journal's status. I do not want to enter into a debate on the wisdom of necessarily arbitrary classifications of this sort made in regard to young people scarcely out of their teens, when these same classifications are accepted as criteria influencing or determining subsequent professional advancement in later life. Perhaps such classifications do not pay enough regard to possible late maturing of individual talent. But they do, in a way, answer the deeply-felt American need for establishment of competitive standards in the professions to which all can aspire and which the most able can attain; in this sense, if the American legal profession must be élitist in its organization it will, at least, be a democratically-recruited élite. The able and ambitious, whatever their financial, or for that matter social or ethnic, background, can ascend to the top.[15]

What I do question in the law journal system are some of its long-range effects on legal education and on legal scholarship and thinking in the United States. The American law journals are models of concentrated research and scholarship, but it is an essentially low-level, problem-oriented research and scholarship.[16] American legal education as a whole is problem-oriented too — here I hark back to the case system once more — but the law journals are even more so. The model of law journal research is the case-note or case-comment — masterpieces of exhaustion of detail but singularly lacking in broad principle or philosophy.[17] Of course this condition is understandable, granted student editorship and a student editorship that changes, as to its key decision-making posts, each twelve months. Such philosophy as there is must normally be developed *ad hoc* or else carried on mechanically from year to year. What I doubt is whether this system, even with some of the veiled pressures and advice that come from the faculty (especially in the smaller schools), can provide that opportunity for long-range reflection and in particular for the continuing re-examination of ultimate goals and objectives and of the relationship of particular instruments for achieving particular ends to those ends themselves, that is necessary for any profession that hopes to keep alive and vital. Anyone reading the major American law journals at the present day must be struck by the absence of sustained policy-type discussion in their pages.[18] An attempt to counter this

14. Such an Intramural Law Review was, in fact, introduced at the New York University School of Law several years ago, as an autonomous student-edited journal separate and distinct from the existing *New York University Law Review*. Riesman mentions, somewhat facetiously, that he himself attempted (quite abortively) to start "another law review with nonlaw-review men" at Harvard. Riesman, *op. cit. supra,* note 11 at 649.

15. "Naturally, the confidence that comes of believing this [that law school marks are infallible] — believing that one got one's start through ability and not looks or luck (confidence which in other versions has been part of the dynamism of the self-made man) — is purchased at the cost of others being robbed of confidence." *Ibid.*

16. See, especially, the pungent criticisms by Miller, *A Modest Proposal for Changing Law Review Formats,* 8 JOURNAL OF LEGAL EDUCATION 89 (1955).

17. There may, however, be a certain element of consumer (the practicing profession, at least) approval of present law journal policy as to internal organization. See the survey (on a somewhat different point) made by Mueller and Skolnick, *Bar Reactions to Legal Periodicals: The West Virginia Survey,* 11 JOURNAL OF LEGAL EDUCATION 197 (1958).

18. Thus, Dean Stason of the University of Michigan Law School has posed the question

omission is the mild Editorial — strictly an advance-prospectus — that has been appearing in the *Harvard Law Review* regularly in the last several years. And the law professors themselves, aware of the danger, have themselves provided some corrective with the professor-edited, general principle-oriented journals like the *Journal of Legal Education,*[19] and *Law and Contemporary Problems,*[20] that can face up to problems of possible synthesis of competing ideas in law at the present day. But these journals are of relatively recent origin and as yet may lack the full prestige and influence of the older, student-edited journals of the "national" law schools.

I have mentioned already the developed pattern of hierarchical progression from law journal editor to law professor. This leads me to the plight of professorial scholarship in law, at the present day, in the United States. When I speak of "plight" I do not mean to imply that there is not an extraordinarily high standard of scholarship in American law, or that American professors do not work extremely hard — harder, certainly, than their counterparts in the Commonwealth countries. The competitive system for promotions, in operation in the major American law schools, would, I think, be enough by itself to ensure a constant and continuing literary output, at least until the last promotion hurdle is cleared, though most professors at the major schools seem to work without any such artificial incentives. But it is the *character* of the research that I want to direct attention to, not its quantity or its abstract quality. The prime research outlet in the American law school is the casebook: it is, as a percipient American scholar has observed, the built-in prestige symbol of American legal scholarship.[21] Now a casebook, as its name implies, is primarily a scissors-and-paste job — a collection of court decisions loosely stuck together with explanatory headnotes or footnotes.[22] I am not denying that a form of interstitial scholarship may emerge from the casebooks — Dean Griswold points out that many scholarly notes are embedded in them.[23] But the point is that the scholarship

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tellingly: "Are the law reviews and law journals, prolific as they are, diluting unduly our constructive and productive efforts? Are we in academic pursuits taking on numerous minuscule literary jobs, worthy in themselves, but serving to bar us from effective prosecution of large-scale research?" Stason, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 4-5 (Conard ed., 1955). And see also Miller, *op. cit. supra,* note 16 at 89.

19. Published by the Association of American Law Schools, the general body representing American law professors, and now (1958-59) in its eleventh volume. It is edited for the Association by members of the Faculty of Law at Duke University.

20. A quarterly, published by the Faculty of Law at Duke University.

21. "For a generation, the typical, almost the exclusive, book-size production of legal scholarship has been the casebook. A casebook in print is the symbol of professional contribution and status." Hurst, *Research Responsibilities of University Law Schools,* 10 JOURNAL OF LEGAL EDUCATION 147, 158 (1957).

22. "This generation of legal scholars finds that the challenge to master a field of the law consists in showing that it can be reduced to teachable proportions. It is a commentary upon how little serious commitment to basic research there is in the law school world that casebook production should so long have enjoyed the prime claim on our creative energies." *Ibid.*

23. "There have been a relatively few law teachers who have worked hard and effectively to broaden and diversify the contribution of the law schools to knowledge and to the application of knowledge to the improvement of the law. But law schools generally have not been notably successful in opening up new fields for research activities and new methods for their pursuit. In this, law teachers have lagged far behind their fellows working in the

in the casebooks is interstitial, the intellectual discussion being fragmented and dissipated and in no sense comprehensive and synthesizing.[24] And on the whole the patterns of casebook organization tend to be standardized or conventionalized throughout the country in regard to selection and organization of materials for discussion, with little opportunity, in consequence, for innovation or the breaking of new ground; and so much sheer physical energy goes into the checking for accuracy of case citation and other purely mechanical tasks associated with the preparation of the casebook, that little professorial energy seems to remain for professorial research and writing other than the conventional law review case-comment type article, the traditional "filler" material for casebooks.[25] It is a red-letter day in an American law school when someone publishes an independent monograph treatise, and then it is more than likely to be written by an advanced scholar — Harold Lasswell or Filmer Northrop, both now of the Yale Law School faculty, for example — who has strayed into the law school after making his name in another discipline.

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fields of the natural sciences, including medicine, and well behind many of those working in other areas of the social sciences.

". . . Law teachers turn naturally to the compilation of teaching materials (in which many scholarly notes are imbedded), and to the writing of articles on questions that come to the fore in the classroom. This leaves little opportunity for inquiries in other directions or for the development of basic studies which would involve investigations into the actual operation of legal processes and institutions." Griswold, *Harvard Law School, Dean's Report, 1957-1958* 11-12.

24. "The research that will make a good casebook need go no further than to turn up stimulating questions within a quite generalized frame of reference; the function of the casebook does not require its author to spend toil on answering the questions. Langdell's stripped-down contracts casebook met all the responsibilities of research directed at course construction. The extended commentaries of the current casebook edge toward quite a different responsibility but typically avoid its fulfillment, striking a balance on limited issues and disclaiming determinations on big ones. This is fitting enough for making useful casebooks; it does not go more than part way, however, toward meeting the university's obligation to advance knowledge of the legal order." Hurst, *op. cit. supra,* note 21 at 160.

25. Professorial preparation for the case method instruction, if that method is to adhere faithfully to its stylized format of a series of responsive questions addressed by the professor to the class, is also, it is to be noted, particularly time consuming. Griswold, *Harvard Law School, Dean's Report, 1957-1958,* p. 12. Among other explanations suggested for the marked lag in advanced research at the present day are the immense administrative adjuncts of education in the modern American law school. Stason, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 5 (Conard ed., 1955). Dean Cavers speculates on whether the American law school may not now have to develop a specialist research cadre on the pattern successfully developed (through training in research for the Ph.D. degree) in the American graduate school. Cavers, *Manpower for Research, id.* at 91 *et seq.*

The imagination and flexibility of the University administration (the Dean of the Law Faculty, or even the University President) in actual utilization of existing intellectual resources on the Law Faculty, especially scarce research intelligence, may be crucial. Thus Llewellyn mentions that President Nicholas Murray Butler of Columbia succeeded in keeping Mr. Justice Cardozo's posthumous papers out of Llewellyn's hands. — Llewellyn, *id.* at 30-1. On the other hand, a more perceptive administrator, Charles E. Clark, then Dean of the Yale Law School, handled the brilliant but difficult Thurman Arnold with understanding and kindliness, with immediate and outstanding results from the viewpoint of productive research: *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937) appeared in quick succession. — Clark, *id.* at 177. And as to the general problem of overall planning of research programs and handling of manpower for research, see McDougal, *The Policy-Science Approach to International Legal Studies,* in LECTURES ON INTERNATIONAL LAW AND THE UNITED NATIONS 61 (Bishop ed., 1957).

I have promised some examination of the case method of teaching in American law schools and I will not delay it longer. The case method seems to have started, in part, as a simple revolution in teaching *materials*.[26] Instead of the loose, sprawling authorities referred to as adjuncts to the old pre-Civil War lecture system of instruction, Langdell planned at Harvard a more concise, core set of materials — a group, so to speak, of ideal cases representing the best in the continuing common law tradition.[27] It was this emphasis on the ideal case, with the built-in implication of timelessness in law that caused Jerome Frank, I am sure, to advance his most devastating criticism of Langdell as encouraging an unwholesome isolation of legal education from legal practice.[28] But it is not the case method as practiced by Langdell that we are concerned with but the case method of this post-World War II era as developed and refined and extended under the influence of the American Realists and the sociological school of law. One should beware, of course, of assuming too easily that the case method must mean the very same thing to everyone who employs it — Dean Griswold reminds us that Ames and Williston could conduct a class of almost any size, with equanimity, with the case method;[29] but he concedes that there are no more Ames or Willistons around now (even at Harvard).[30] What is a vibrant exercise in the Socratic method with one teacher may, with a lesser man, be reduced to a conversational mumble punctuated at fitful intervals by irrelevant questions directed to the audience. But by and large the case method of teaching, as practiced today in the American law school, has these elements in common. It is interested in asking questions rather than in answering them;[31] it is problem, rather than principle, oriented;[32] it is, in the Realist vein, attuned

26. See generally HURST, THE GROWTH OF AMERICAN LAW. THE LAW MAKERS 260 *et seq.* (1950); REUSCHLEIN, JURISPRUDENCE — ITS AMERICAN PROPHETS. A SURVEY OF TAUGHT JURISPRUDENCE 78 (1951); A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 140 *et seq.* (Goebel ed., 1955).

27. But note Morris Cohen's tempered criticism of Langdell's failure (due, in Morris Cohen's view, to Langdell's ignorance of Roman law, ancient or modern) to see that the common law was not a purely timeless logical system but merely a body of rules that grew up, historically, under definite social conditions, in England. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 151-6 (1954).

28. Frank, *A Plea for Lawyer-Schools*, 56 YALE LAW JOURNAL 1303 (1947). And compare also Morris Cohen's attack on Langdell's preoccupation with the late 18th century in his rather irrational acceptance of the English common law of that particular era as the "perfect embodiment of a completely rational legal system." COHEN, *op. cit. supra*, note 27 at 152.

29. "Looking over the past, it seems fairly clear to me that a class of almost any size conducted by Dean Ames or Professor Williston would provide better legal education than a small class under a lesser teacher." Griswold, *Harvard Law School, Dean's Report, 1957-1958*, p. 10.

30. *Id.* at 11.

31. Hurst, *op. cit. supra*, note 21 at 160.

32. "Today the most significant effect of [the Langdell school's] lack of any coherent philosophy is shown by its influence in the restatement of the law. The doctrine of *stare decisis* and the empiricist living from hand to mouth that is called 'deciding each case on its merits' (without any guide on how to evaluate these merits) have made our actual law a hopeless labyrinth. Clearly, there is no way out except by some process of selecting some rulings and rejecting those that conflict with them. This, however, requires conscious examination and evaluation of the policy of the law, for which there is no room in the tradition of the Langdell school. The law is viewed as a perfect system, even though in practice it cannot be so." COHEN, *op. cit. supra*, note 27 at 155.

to the solution of single cases rather than the synthesis of long lines of decisions; it is fact-conscious and emphasizes the *ad hoc* character of judicial decision making;[33] it aims at the identification of the competing interests (individual or group) involved in any problem-situation rather than at any deep-seated exploration of the psychological origins of those same interests or at an attempt at scientific evaluation of them.[34] The dilemma over recourse to values in the actual decision-making process — of preference for one competing interest rather than another — is solved in an impressionistic, almost unconscious way. For the governing values, on this particular type of approach, will be societal ones; the differing interests pressed in the particular problem-situation are valid, in true Jamesian fashion, simply because they are pressed;[35] the ideal solution is the one that least interferes with or disturbs the complex of interests being pressed in society as a whole.[36] What we have operating here, then, is philosophical relativism — American legal Pragmatism in the best sense of the word. Now there are very many who will see nothing wrong with Pragmatism as a general philosophy of law and I have, in fact, no quarrel with them on the general issue at this stage. The point is, simply, that what is really, in the ultimate, a problem of values and value-choice is concealed in the interstices of methodology. The crucial part of the decision-making process is, I believe, slurred over and all too frequently ignored altogether in the general technique-oriented law school approach.

It is, however, not until very recent years, and certainly until after World War II, that this all-exclusive preoccupation with method has begun to present any special problems for American law schools or American lawyers. I think this fact is largely due to the erstwhile substantial agreement on fundamentals

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33. Thus Roscoe Pound himself assailed the American Legal Realists' "insistence on the unique single case rather than on the approximation to a uniform course of judicial behavior. . . . Radical neorealism seems to deny that there are rules or principles or conceptions or doctrines at all, because all judicial action, or at times much judicial action, cannot be referred to them." Pound, *The Call for a Realist Jurisprudence,* 44 HARVARD LAW REVIEW 697, 707 (1931). However, Llewellyn, in replying to Pound, suggested that this Realist emphasis could be explained, more simply, as a distrust of traditional legal rules and concepts insofar as they purported to *describe* what either courts or people were actually doing; a distrust of the theory that traditional prescriptive rule-formulations were the *heavily* operative factor in producing court decisions; and a belief in the worthwhileness of grouping cases and legal situations into narrower categories than had been the practice in the past. Llewellyn, *Some Realism about Realism — Responding to Dean Pound,* 44 HARVARD LAW REVIEW 1222, 1237 (1931).

34. This proposition applies especially to Roscoe Pound's interest-oriented, sociological jurisprudence. See especially the discussion by Pound's student and authoritative interpreter, Julius Stone. STONE, THE PROVINCE AND FUNCTION OF LAW 355 *et seq.* (1946).

35. WILLIAM JAMES, THE WILL TO BELIEVE (1897); JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907).

36. The association of James' thinking with Roscoe Pound's Sociological Jurisprudence and with contemporary American legal thought generally is both proximate and substantial. STONE, *op. cit. supra,* note 34 at 355-368; PATTERSON, JURISPRUDENCE — MEN AND IDEAS OF THE LAW 516 *et seq.* (1953); Jones, *Edwin Wilwhite Patterson: Man and Ideas,* 57 COLUMBIA LAW REVIEW 607, 610 (1957). For analogous influences on American legal thought, of the pragmatism of Charles Peirce, see Freund, *Thomas Reed Powell,* 69 HARVARD LAW REVIEW 800 (1956); of the pragmatism of Dewey, see Frank, *Modern and Ancient Legal Pragmatism — John Dewey and Co. vs. Aristotle,* 25 NOTRE DAME LAWYER 207 *et seq.* (1950).

among American lawyers once the New Deal-Welfare State ideals had become received majority opinion, and concomitantly while the Realist and sociological drives in American law were at their height. The problems have come with the great tension issues of the 1950's — problems of the necessary definition or redefinition of relationships between man and the State — especially in the internal security and race relations area. On these issues, clearly, there has been no substantial community consensus as yet, and the dilemma of value-choice of necessity could therefore no longer be smothered over or remain submerged. Unfortunately American lawyers and law teachers seem to have been caught largely unprepared because intellectually unequipped for its solution.

Now it would be wrong to suggest, in any crude, oversimplified way, that the villain of the piece is the man who first thought of abolishing the compulsory courses in Jurisprudence and Philosophy of Law or in Legal History in the American law school. A great deal of the blame undoubtedly rests with the professional jurisprudes themselves. We are reminded that the American Realist drive brought with it, thirty years ago, many bold calls to action, but little concrete action,[37] even (or, perhaps, especially) on the part of the Realists themselves.[38] The Realists, on the whole, were a protest movement, and had no affirmative program for legal action to offer in place of the existing order that

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37. "Taken alone, [the legal realist movement's] attitudes and methods are not adequate to the opportunities and obligations of our time." McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community,* 56 YALE LAW JOURNAL 1345 (1947).

". . . We have had little treatise production and a thin and uncertain trickle of monograph publication about the law. Of course, we must reckon with the interruption of the war; perhaps, too, the very pace of change might naturally be expected to outdistance scholarly reflection upon it. But there was not a substantial research output in the decade before the war. The stir in legal philosophy over 'realism' from the mid 1920's on produced many calls to bold work — and little work. And the excuse of the war's disturbance begins to wear thin by 1957." Hurst, *op. cit. supra,* note 21 at 158.

Compare the blistering attack on the whole realist drive for integration of law and the social sciences that culminated in the short-lived Center at Johns Hopkins University in the late 1920's — an attack made, albeit partly with tongue in cheek, by an elder statesman of legal realism, Llewellyn: "Never in the long history of efforts toward social science had there been as ill-considered, badly prepared, and generally useless squandering of research money as in the Hopkins experiment . . . . If you want to know what kept the foundations from being interested in other than doctrinal legal research, the answer is the Hopkins experiment . . . .

"[Underhill] Moore, for my money, put forward the absolute nadir of idiocy when he tested out whether law has mystical operations by an elaborate, sustained set of observations and meterings and statistics on the non-effect, on the parking practices of people in New Haven, of a change in the official traffic regulations in New Haven, which he had carefully arranged to keep anybody in New Haven from knowing had occurred. This is bottom. You'll never get below it, gentlemen. It's like the market at the bottom of 1932. It can only go up from there." Llewellyn, *Social Significance in Legal Problems,* in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 10-11 (Conard ed., 1955).

38. But see the spirited reply by another realist, Judge Charles E. Clark (of the United States Court of Appeals for the Second Circuit, and formerly Dean of the Yale Law School): ". . . Whatever the mistakes we made, we were at least willing to make them. In other words, we got beyond the stage of talking to the stage of doing . . . . It seems to me as I look around that there's one thing that we're now missing, and that is the willingness to take a chance. Perhaps another way to put this is that we should have the courage to try even if we fail." Clark, *id.* at 175.

they were bent on overthrowing.[39] And there is something to the suggestion that sociological jurisprudence, as an essentially empiricist philosophy, is little calculated to produce reflection on ultimate values in law.

When I consider the standard outstanding products of the contemporary national law school in the United States — and I stress that I am considering, now, the Law Journal editor-type, hard-working, intelligent, and dedicated as he is — I think I see men who, in Isaiah Berlin's words, "pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle; [who] lead lives, perform acts, and entertain ideas that are centrifugal rather than centripetal."[40] The American law school has, I think, produced a generation of foxes — of low-level empiricists — at a time when the need for devising ordering principles in law was never greater. The complete atrophy at the present day of American thinking on Federalism (formerly so rich and vibrant a subject of study), on political pluralism and the territorial dispersal of power — has never been more apparent than in the confused and bitter doctrinal debate in the aftermath of the 1954 Supreme Court decision on school-segregation.[41] The problems of definition and redefinition of the relationship of Man and State — the conventional area of political liberalism — in the continuing world condition of bipolarity of power has not been solved, *Jencks*[42] *et alia* notwithstanding. The need for a value or policy-oriented jurisprudence (whether natural law or otherwise) has never been more apparent if we are to supply the judiciary and practicing profession with some more affirmative guides to decision-making in this crisis age.[43]

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39. Note the shrewd assessment of the historical significance of the legal realist movement in American law, advanced by Thurman Arnold, himself one of the realist notables of a generation ago: "Realistic jurisprudence is a good medicine for a sick and troubled society. The America of the early 1930's was such a society. But realism, despite its liberating virtues, is not a sustaining food for a stable civilization." Arnold, *Jerome Frank*, 24 UNIVERSITY OF CHICAGO LAW REVIEW 633, 635 (1957).

40. BERLIN, THE HEDGEHOG AND THE FOX. AN ESSAY ON TOLSTOY'S VIEW OF HISTORY 1 (1953). For a thoughtful assessment of the potential contribution of Berlin's philosophy of history in developing new philosophic perspectives for English law students, see the comment by Jerome Hall, 44 VIRGINIA LAW REVIEW 321 (1958).

41. Brown v. Board of Education, 347 U.S. 483 (1954).

42. I am referring, here, to the group of major decisions handed down by the United States Supreme Court in the Spring, 1957, court term. See especially Jencks v. United States, 353 U.S. 657 (1957).

43. See, for example, Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE LAW JOURNAL 203 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE LAW JOURNAL 1345 (1947).

BOOKS REVIEWED

THE POVERTY OF HISTORICISM. By Karl R. Popper. Boston: The Beacon Press, 1957. Pp. xiv, 166. $4.00.

This fascinating little book, which appropriately is dedicated to the ". . . memory of the countless men and women of all creeds or nations or races who fell victims to the fascist and communist belief in Inexorable Laws of Historical Destiny," is the kind of scholarly work that brings to the reader at the same time a deep sense of flooding pleasure and a feeling of profoundly exciting disquietude which stems from the realization that a message of enormous importance is being delivered. Such a message, therefore, cannot simply be "reviewed" in the traditional meaning of the term. It must first be reported on and then evaluated.[1]

The fundamental thesis of Popper's book is (1) that the belief in "historical destiny" — a concept so attractive to babbling philosophers and so useful to scheming tyrants — is sheer superstition, not to say nonsense; and (2) that for strictly logical (or scientific) reasons it is absolutely impossible to predict the future course of human history by scientific or any other rational methods. (pp. vii; ix) This is so because the course of human history is strongly (and perhaps decisively) influenced by the growth of human knowledge. But if there is such a thing as a growing human knowledge, then we cannot possibly anticipate today what we shall or may know tomorrow. In other words, the present-day scientist, unless he be a hopeless fraud, cannot accurately predict by the use of accepted scientific methods the future results as well as the long-range effects of his research. And since we cannot possibly predict, by any known rational or scientific methods, the future growth of our knowledge, we cannot predict the future course of human history. Thus, Popper concludes, we must reject the scientific validity of any purely theoretical history.[2]

By the term "historicism" Popper means an approach to the social sciences (and to history in general) which implicitly or explicitly assumes, usually on the basis of some very common but nevertheless extremely fateful misunderstanding of the methods and aims of science in general, that historical prediction is the principal aim of the social sciences; and that this aim is attainable by the discovery of the rhythms, patterns, laws or trends that allegedly underlie the evolu-

1. Popper, it will be noted, first tries to make a strong case in favor of historicism in order to give substance and meaning to his subsequent criticism. He presents the various forms of historicism as types of a well-considered and close-knit philosophy. Thus he succeeds in building up a position worth attacking. In a way he perfects (and condemns) a philosophical theory which frequently — and perhaps all too frequently — has been advanced, but really has never been fully stated as to its methods and aims.

2. From all this it follows that there can be no scientific theory of historical development serving as the basis for historical prediction. (p. x)

tion of human history.[3] (p. 3) Popper correctly insists that the various attempts to imitate in the domain of the theoretical social sciences the methods applicable to the physical sciences have on the whole met with failure. Hence arose a violent dispute as to whether the methods of the physical sciences were at all applicable to the social sciences;[4] and, according to their particular views as to the applicability or nonapplicability of the methods of the physical sciences to the social sciences, "pronaturalistic" and "anti-naturalistic" schools of social thought developed. (p. 2)

The anti-naturalistic historicist asserts that owing to the radical differences that exist between physics and sociology, the methods of the physical sciences cannot be applied to the social sciences. Sociological "laws," it is said, differ in different places and different periods of history; they depend upon history and differences in culture. They are determined by a particular or unique historical (or cultural) situation. (p. 5) Also, the possibility of generalizations always rests upon the (alleged) general uniformity of nature (including human nature) — on the assumption that in like or similar situations or circumstances like or similar things will happen. This assumption the anti-naturalistic historicist rejects as useless and even erroneous. He points out that similar circumstances arise only within a single historical or cultural period. Since they never persist from one period to another, there cannot possibly be a long-run uniformity in human society on which long-run generalizations could be based. (p. 6) But more than that: he insists that all generalizations implicitly surmise that there is no such a thing as everlasting regularities in human history (that "nothing is really new under the sun"). This, in turn, would deny the possibility of any truly significant development or evolution in history.[5] (pp. 6-7) To the true anti-naturalistic historicist "social uniformities" differ widely from the "uniformities of nature" (if such a uniformity of nature exists at all) in that the former change from one historical period to another. He also maintains that human action is the real force that changes (and determines) them. Social uniformities are not "laws of nature," but are man-made facts. And although they depend on human nature, they do so because human nature has the power to change and, perhaps, to control them. Hence things and situations can be improved or worsened by man himself, and active reform is by no means futile. Such notions, it goes without saying, have a strong appeal for those "activists" or reformers who simply refuse to accept

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3. Popper also insists that this historicistic approach to the social sciences is responsible for the unsatisfactory state of present-day theoretical social sciences. (p. 3)

4. Windelband's and Rickert's pioneering efforts to distinguish between the "natural sciences" and the "cultural sciences" would be in point.

5. Popper observes here that naturalistic theories of society which rely on such generalizations (or general "laws") are frequently used for apologetic purposes. Unpleasant or undesirable situations must simply be accepted since they are determined by "inexorable laws of nature." Thus the allegedly "inexorable laws of economics" have been invoked to denounce economic or social reforms. At the same time, by fostering a general feeling of inevitability, these naturalistic theories have instilled (or tried to instill) in people a kind of quietism or fatalism — a readiness to endure an unnecessarily bad situation without protest: what is now will be forever in the regularity of events, and all attempts to bring about a change are outright ridiculous and even blasphemous. But these are essentially "conservative" (and biased) arguments against all change and progress, and in favor of retaining the *status quo*.

things as they are, and who deny that certain situations are inevitable. (pp. 7-8)

The anti-naturalistic (or "idealistic") historicist also argues that significant social experiments, especially large scale social experiments, are never experiments in the sense of the physical sciences: they are made solely for socio-political purposes, but never to advance knowledge. Since social experiments change the conditions of society, and since they can never be repeated under precisely similar (or identical) conditions (because these conditions were changed in and through the first social experiment), they are not scientific at all. (p. 9) "History may repeat itself," but never on the same level, especially if the events concerned are of historical importance and if they exert a significant influence on society. Hence all "social newness," the anti-naturalistic historicist insists, is an "intrinsic sort of newness," while newness in the physical sciences is merely a newness in arrangement and combination and, hence, no real newness at all. Social newness, on the other hand, is genuine newness, because it is irreducible to the newness of arrangements. The "same old social factors" are never really the "same old social factors." But where nothing can repeat itself precisely, real newness emerges.[6] (p. 10) Social factors and social events may be classed together with other (and previous) social factors or events. But they are also unique in a very definite way. Even if we should be able to discover how and why any particular factor or event came about — if we should understand intuitively its causes and its effects and if we comprehend the forces which occasioned this factor or event — we would still be unable to formulate, in a manner analogous to that of the physical sciences, "general laws" which could serve as a general description of such causal nexi. (p. 11) The anti-naturalistic historicist who insists that nothing is more important than the emergence of a really new period, is justified, therefore, in proclaiming that the ordinary methods of the physical sciences are inapplicable to the most important feature of society: its division into historical epochs and the emergence of true newness. (p. 11) In addition, the complexity of social phenomena poses unique problems not shared by the physical sciences where investigations may artificially be simplified by the methods of experimental isolation. But such an artificial experimental isolation is not feasible in the social sciences, exactly because complexity is an essential aspect of society and history. (p. 12)

In the field of the social sciences, Popper points out, the problem of prediction is of acute significance. For the anti-naturalistic historicist (but not for the pronaturalistic historicist) social prediction is admittedly an extremely difficult if not impossible task. A prediction, we know, may actually have some influence upon the predicted event, especially in the social sciences, where there frequently exists a complex and complicated interaction between the predictor and the predicted event. The awareness of the existences of certain tendencies which might result in a particular event, as well as the realization that the prediction might itself exert a decisive influence on the predicted event, is likely to have a definite impact upon the content of the prediction itself. This impact, in turn, might be of such a nature as to impair and even determine the predicted event. A pre-

6. This insight is basic for the understanding of new epochs in human history, each of which significantly differs from any other historical epoch.

diction is actually a social happening which may well interact with other social happenings, among them the one which it predicts. Thus it may precipitate an event that otherwise might never have happened; or it may influence an event that otherwise might have occurred differently. It may actually cause the events which it predicts, or it may prevent the occurrence of an event by deliberately refusing to predict it.[7] (pp. 13-15) The interaction of the social scientist's pronouncements (or predictions) and social life invariably creates actual situations. Hence, according to Popper, we have to consider not only the truth of these pronouncements (or predictions), but also their actual influence on future events and developments. (p. 16) The social scientist may primarily be searching for truth, but in doing so he most decidedly exerts a definite influence on society and social life.[8] But where predictions or particular interests of one kind or another have such an influence on scientific theories, pronouncements or predictions, it becomes doubtful whether bias, prejudice, or ill will can be fully avoided or even always detected. (p. 16) In the social sciences there are probably as many tendencies as there can be found in social life. This, in turn, may well lead to that extreme form of relativism which holds that objectivity or truth is inapplicable to the social sciences where only success — that which actually works — can be decisive. (p. 16)

Another reason why the anti-naturalistic historicist denies that the methods of the physical sciences cannot successfully be applied to the social sciences is his assumption that all "sociology" must be understood in a comprehensive or "holistic" manner: the objects of the social sciences, such as social groups, are more than mere aggregates — more than a mere sum total (or "heap") of its members, as well as more than the mere sum total of relationships. Since, according to the historicist's point of view, all social groups have their own traditions, their own institutions, and their own rituals, these social groups must be studied as a whole if we are to understand them and, perhaps, foresee (and foretell) their future development. This holistic approach not only distinguishes the social sciences from the physical sciences (pp. 17-18), but it also strongly suggests a close connection between certain types of historicism and the "organic theory of social structures" — the theory which interprets social groups by analogy to biological organisms. Holism, then, seems to be characteristic of biological phenomena in general (and to the "organic social theories"), and the holistic approach is said to be indispensable for the understanding as to how the history of the various organisms — biological as well as social — influences and determines their behavior. Thus emerged the widespread theories of "group-spirit" or *"Volksgeist"* which becomes the carrier of "group traditions." (p. 19)

It has been argued by the anti-naturalistic historicists that the proper method of the social sciences, as contrasted with the methods of the physical sciences, is based upon an intimate or "intuitive" understanding of social phenomena: soci-

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7. Social science, in the hands of "progressive interests," may serve as a kind of midwife, helping to bring forth a new social situation. But it may equally well serve, in the hands of "conservative interests," to retard or prevent impending social changes. (p. 16)

8. The fact that his pronouncements exert an actual influence on society destroys, or at least greatly diminishes, his scientific objectivity to the degree that these pronouncements influence the objective which he investigates.

ology aims at an understanding of purpose and meaning rather than at a causal explanation; it tries to understand history and historical developments in "qualitative terms," that is, in terms of conflicting aims and tendencies, or in terms of "national character" or the "spirit of the age." This being so, sociology can operate only on the basis of a "sympathetic imagination," and, hence, must be content with the understanding of unique events and of the role they play in particular situations.[9] (p. 20) From all this it would follow that a method capable of understanding the meaning of social events must go beyond mere causal explanation. It must be holistic in character; it must aim at determining intuitively the role played by the event within a complex structure — within a whole which comprises not only contemporaneous parts but also the successive stages of a historical development. (p. 23) The method of "intuitive understanding," it should also be borne in mind, agrees not only with the theories of holism but also with the anti-naturalistic historicist's emphasis on novelty; novelty cannot be explained causally or rationally, but can only be grasped intuitively. (p. 23) But more than that, the social sciences must adopt a methodical (or methodological) essentialism (p. 30), for it is the task of the social sciences to understand and describe social and sociological entities. This can be done only by penetrating into their essences. Hence anti-naturalistic historicists, who stress the importance of social change, in the main are inclined to side with essentialism. (p. 30) Now in every change, they argue, there must be something that changes and at the same time something that preserves the essential identity of the thing that changes. In the social sciences, therefore, there can be no change or development without the assumption of an unchanging essence. (pp. 31-32) This "essentialism" not only enables the social scientist to detect a "lasting identity" in everything that changes, but it also furnishes some of the most persuasive arguments in support of historicism — of the doctrine that the social sciences must adopt a historical method or, to be more exact, the historicistic method.

Although strongly in favor of scholarly (or technical) investigations of social phenomena (pp. 55-58), Popper points out that any form of historicism, no matter how learned it may appear, is in the final analysis a poor method, unable to yield the scientific results which it promises. One of the main reasons for his rejection of historicism, especially of anti-naturalistic historicism, is the method or methods which the latter proposes, namely, Utopian or large-scale social engineering in order to realize its aims. At the same time Popper strongly sympathizes with what he himself calls "piecemeal social engineering," which signifies to him the practical piecemeal (and cautious) application of the results of piecemeal technology — the conscious utilization of all available technological knowledge to social life where the end is outside the province of technology. (p. 64) In this, piecemeal social engineering differs vastly from anti-naturalistic historicism which through its "total" or large-scale engineering theories regards the ends of human activities as dependent on historical forces and

9. The physical sciences, on the other hand, can arrive at universally valid uniformities, and can explain particular events as instances of such uniformities. As a matter of fact, the social sciences know nothing that could be compared to the mathematically formulated causal laws of physics. (p. 25)

thus within the province of technology. It is the prime task of the piecemeal social engineer to design new social institutions or to reconstruct, overhaul, or run already existing ones. Looking upon social institutions from a functional or instrumental point of view, the piecemeal social engineer always realizes that only a minority of the existing social institutions are consciously designed, while the vast majority have just "grown" and, hence, are the more or less accidental result of human actions. (p. 64) Although he may cherish some notions which concern society as a whole, he is sufficiently honest to realize how little we actually know and how much we can learn from our mistakes. Hence he does not believe, and consequently refuses to engage, in overly ambitious plans of redesigning society as a whole. Whatever his ends, he always tries to achieve them by small adjustments and re-adjustments which can continuously be improved upon.[10] (p. 66) He will avoid undertaking reforms of a complexity and grandeur which make it impossible for him to know exactly what he is doing.

Such rather modest and at the same time intelligent piecemeal social engineering, needless to say, runs contrary to the temperament of many "social activists" whose ambitious programs as often as not are plainly holistic or Utopian. Holistic or large-scale social reform programs aim at nothing less than the complete remodeling of the whole of society in accordance with a definite plan. (p. 67) By the same token the holistic social engineer rejects the piecemeal approach as being either too modest or too "inefficient" or too "cowardly," although at least in practice he is compelled always to resort to haphazard and crude applications of the piecemeal method, without, however, using the cautious and self-critical aspects of the latter. In the final analysis, successful holistic social engineering is simply impossible. The greater the total changes attempted, the greater are the unintended and unexpected repercussions, thus compelling the holist social engineer constantly to resort to piecemeal improvisations. This, in turn, continually forces him to do things which originally he did not intend to do, with the startling result that he becomes engaged in unplanned planning. (pp. 68-69) The basic difference between Utopian or large-scale social engineering and piecemeal social engineering, Popper correctly observes, is not so much a difference in scope or scale as a difference in caution, preparedness, and method of application. While the piecemeal social engineer can approach his task with an open mind as to the method or scope of the envisioned reform, the holistic or Utopian social engineer, who has decided beforehand that a complete, radical, and irrevocable social reconstruction of the whole of society is not only possible but necessary, attacks his task with a closed mind and, accordingly, tries to carry it out by ruthless means without any regard for people or facts.[11] "The well-known and frequently unmanageable uncertainties connected with the human factor often compel him, whether he likes it or not, to attempt to control this human factor by institutional means, thus trying to control man totally by completely transforming him. Instead of constructing a new

10. Also, he is never completely and irrevocably committed to just one line of action or policy.
11. In this sense the Utopian approach also violates the principles of scientific method.

society fit for men and women to live in, he ends up by reshaping these men and women to fit into his new society." (pp. 69-70)

It is this objectionable holistic approach to all social problems which not only distinguishes historicism radically from recommendable piecemeal social engineering, but which also makes possible an alliance between historicism and certain types of holistic or Utopian social engineering. As a matter of fact, the strongest element in this unholy alliance between historicism and utopianism is the decidedly holistic approach to all social problems which is common to both: historicism is interested in the development, not of limited aspects of social life, but of society as a whole; and Utopian social engineering is similarly holistic. Perhaps the two most pronounced representatives of this alliance are Plato and Marx. Plato, the pessimist, held that all change is decay. Hence his Utopian blueprint for the ideal society aimed at preventing or arresting all change and progress.[12] Marx, the optimist, devised a blueprint for society along the lines of a developing, changing, or dynamic theory, predicting a Utopian society which knows no political or economic coercion. (pp. 73-74) Another link between the historicistic and the Utopian approach is that both insist that their aims or ends are not a matter of choice, or of moral decision, but one of historical necessity. Hence both believe that by scientific methods they can actually find out what these necessary aims or ends of society are (pp. 74-75), and then take the appropriate steps. They also maintain that large-scale planning is simply inevitable — that we must plan whether we like it or not — because of the preordained direction in which history is moving. (p. 75)

The term "whole," Popper observes, has been used to denote (a) the totality of all the properties or aspects of a thing, and, especially, of all the relations holding between its constituent parts; and (b) certain special properties or aspects of the thing in question, namely, those aspects which make it appear an organized structure (*Gestalt*) rather than a "mere heap." Popper is correct when he insists that wholes in the sense of (a) can never be adequately studied or become the object of control or reconstruction. (pp. 76-77) They are simply too intricate to be understood at a glance. Planning to reconstruct and control society as a whole in the sense of (a), the holists are convinced that the power of the State is bound to increase until the State becomes identical (or nearly identical) with society. But for many obvious reasons it is quite impossible to control (or reconstruct) all (or "nearly all") social relationships which make up a concrete society, including such personal relations as those of a mother to her child. It is impossible simply because in doing so the holistic reformer must create a host of new relations likewise to be controlled, the control of which would require further controls, and so *ad infinitum*. Thus the Utopian effort to devise a "total plan" for wholes, like the assertion that the historical (or sociological) method is adequate for the treatment of wholes in the sense of totalities, is tantamount to attempting the impossible.[13]

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12. Cf. KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES, Vol. I (London, 1945; rev. ed., Princeton, 1950 & London, 1952; 3d ed., London, 1957).

13. Hence, in the final analysis, the holistic method necessarily remains a mere program. It is also a mistake to believe that there can be a true history in a holistic sense. Every worthwhile historiography is always a history of certain limited ("piecemeal") aspects of

(p. 80) To insist upon the planning and reconstruction of an entire society in all its complexities, like the attempt to regulate the whole of social life, is merely a cheap effort to threaten man with alleged "historical forces," "impending developments," "historical destinies," or "world trends" which supposedly make Utopian holistic planning and regimentation "inevitable." (p. 82)

Holistic thinking is particularly detrimental in its influence upon the anti-naturalistic historicist theory of social experiments in that it holds to the view that a social experiment could be of scientific value only if carried out on a holistic scale. (pp. 83-84) Such a view, it goes without saying, overlooks (a) those important (and successful) piecemeal social experiments which are fundamental for all social knowledge; and (b) that holistic or large-scale experiments are unlikely to contribute much, if anything, to our experimental knowledge.[14] Piecemeal experiments, by utilizing the method of trial and error, teach us to learn also from our mistakes. In a way, both trial and error are necessary. (pp. 87-88) The piecemeal social engineer not only expects mistakes, but he searches for them. On the other hand, it is not likely that we may learn much from holistic social experiments. For it is very hard to learn from very big mistakes (p. 88), and even harder to admit them. Since in a holistic social experiment so much is done at a time, it is well-nigh impossible to say which particular measure is responsible for any of the resulting situations. To complicate matters, within a holistic or totalitarian social experiment even the greatest efforts to secure well-informed, independent, and critical statements about its achievements are unlikely to prove successful. As a matter of fact, Popper points out, there is very little likelihood that a free and untrammelled discussion of the holistic plan and its results will be tolerated. Every attempt at social planning on a very large or total scale is an undertaking which must cause considerable inconvenience to many people over a considerable period of time. Accordingly, there will always be a tendency to oppose the plan or, at least, to complain about it. To many of these complaints the large-scale or Utopian social planner must turn a deaf ear if he wishes to get anywhere at all. In fact, he will have to suppress any opposition or expression of dissatisfaction, and with it any objections whatever.[15] But in doing so he invariably also suppresses reasonable and well-founded criticism.[16] (p. 89)

But there is an additional and perhaps even more fundamental argument

"total" history. The triviality as well as the vagueness of the statement that the whole is more than the sum of its component parts and, hence, "superior" to these parts, is not always realized. (p. 82) Such slogans as "reason of State" or "the paramount interest of the people" frequently are convenient and useful concepts for scheming tyrants.

14. Those holistic experiments can be called "experiments" only in the sense in which this term would be synonymous with an action the outcome of which is uncertain, but not in the sense in which this term is used to denote a means of acquiring knowledge by comparing the results obtained with the results expected. (p. 85)

15. In the long run he would have to suppress institutions of higher learning, banish books, independent writing, and in the end, speaking. This would lead to the closing down of laboratories for research, the abolishing of scientific journals or other means of scholarly communication and discussion, and the forbidding of scientific congresses and conferences. But with the total abolition of all means of further scientific and industrial progress the holistic plan would have to break down or, at least, deteriorate.

16. The mere fact that all expressions of dissatisfaction are curbed reduces even the most enthusiastic expressions of satisfaction — whether they are voiced in the Red Square of Moscow or at the Party Rally in Nuremberg — to complete insignificance. (p. 89)

against the holistic planner. While it is relatively easy to concentrate political power, it is impossible to centralize all the knowledge and experience which is distributed over many individual minds.[17] Lacking this centralized knowledge and finding himself unable to ascertain what is in the minds of so many individuals, the holistic planner must simply eliminate individual differences, which in the long run constitute the greatest menace to his single or single-minded plan. He must try to control and stereotype interests, beliefs, and aspirations by strictly supervised control and stultifying propaganda—by gaining absolute control over the minds of men. But such "thought control" must destroy the last possibility of finding out what people really think; and ultimately it must destroy knowledge. The greater the gain in social and political power, the greater will be the loss of real knowledge.[18] (p. 90) Holism, then, implies also the colossal assumption that we need not, and actually should not, question the fundamental wisdom and benevolence of the planning Utopian social engineer who is, and must be, vested with dictatorial powers. But even granting the unlimited and unvarying benevolence of the holistic planner, it would be impossible for him as well as for the people ever to find out whether the results of his measures tally with his good intentions.[19] (p. 91)

The holistic historicist of the anti-naturalistic type insists that the experimental method cannot be applied to the social sciences (or to social life) simply because we cannot in the social domain reproduce at will precisely the same or even similar experimental conditions. Aside from the fact that this argument also holds good in the physical sciences (pp. 93-94), it should be borne in mind that it is exactly the social experiment which tells us of changes or dissimilarities in social conditions.[20] Hence there is no real basis for the historical assertion that the variability of historical or social conditions renders the experimental method (and with it, the piecemeal method of social engineering) inapplicable to the problems of society. (pp. 96-97)

If sociology is a theoretical science, the pronaturalistic (but not the anti-naturalistic) historicist maintains, it has not only to explain but also to predict events with the help of general theories or universal laws. Hence, at least from the point of view of the pronaturalistic historicist, sociology turns into a doctrine of historical laws and historical trends. (p. 36) But more than that: the ability of the physical (especially the astronomical) sciences to make certain scientific forecasts, the pronaturalistic historicist argues, must be duplicated in the domain

17. Obviously such centralization of all relevant knowledge would be necessary for a truly efficient and wise "centralized political power."

18. These observations are among the most fascinating and brilliant statements in Popper's fascinating book.

19. Conversely, no such telling criticism of piecemeal or small-scale social engineering could be made. Here success or failure — for instance, in the fight against unnecessary poverty, unemployment, maldistribution of the national income, exploitation, or certain forms of injustice — can more easily be appraised. Also, a fight against concrete wrongs or concrete dangers is likely to find the full support of the majority of the people. This would also explain why in truly democratic societies certain far-reaching reforms, especially in times of great and real crises, may be instituted without the suppression of public criticism or the free press. (pp. 91-92)

20. In fact, the study of human society is not so radically different from the study of nature as some sociologists or philosophers have suggested. See also pp. 139 ff.

of the social sciences. If it is possible for astronomy, for instance, to predict eclipses, why should it not be possible for the social sciences to predict social events? Although it is conceded that an exact scientific calendar of social events to come is impossible, the pronaturalistic historicist nevertheless maintains that the lack of exactness, which is typical of all social forecasts,[21] might be compensated by the sweep and the massive importance of such forecasts.[22] (p. 37) "Large-scale forecasts," the pronaturalistic historicist contends, are the kind of predictions which befit sociology. (p. 37) In sum, the pronaturalistic historicist visualizes sociology as a theoretical and empirical discipline, the empirical basis of which consists in a "chronicle of the facts of history" alone, and the ultimate aim of which is to make large-scale forecasts. (p. 39)

Sociology, at least for the pronaturalistic historicist, thus turns into an attempt to solve the age-old problem of foretelling the future — not so much the future of individuals as that of groups, nations, or perhaps the whole human race. (p. 42) It becomes the "science of things to come," of impending events; and social studies have the primary aim of revealing the social, cultural, and, above all, the political future. Popper points out that there are really two different kinds of predictions — "prophetic (or long-range) predictions" and "technological (or short-term) predictions." (pp. 43-44) To these two forms of predictions correspond two types of social engineering — long-term and comprehensive (large-scale) social planning and short-range or piecemeal social engineering.

The analogy between the social sciences and the natural sciences can also be extended into "dynamics" or the "theory of motions determined by forces." Whenever this is done, sociology turns into a theory of social dynamics, a theory of social movements determined by some social (or historical) forces. (p. 39) Sociology, as conceived by pronaturalistic historicists, is akin to dynamics because it is essentially a causal theory; and causal explanation in general is an explanation of how and why certain things happen or happened. (p. 40) But such an explanation must always contain a historical element. Sociology, then, at least to the pronaturalistic historicist, is theoretical history. But if this is so, then its scientific forecasts must be based on "laws" or, to be more exact, on "laws of history." (p. 41) According to the historicist, the only universally valid laws of history, it seems, are the laws which link successive historical periods or, better, which determine the transition from one historical (or cultural) period to another. (p. 41)

Although to the pronaturalistic historicist social science is nothing more than theoretical history, it is not history in the ordinary sense of the term, for it actually looks both back on the past and forward to the future: it is the study of the operative forces as well as of the laws of social development. These laws are laws of progress, change, or arrest. In keeping with this insight, the sociologist must

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21. This unavoidable inexactness is due to the inherent complexity of social events; it stems from the interconnections of these events and from the qualitative (rather than quantitative) nature of social facts.

22. Although on account of their substantial complexity as well as their qualitative nature the social sciences are relegated to suffer from vagueness, their qualitative character at the same time endows it with that kind of comprehensiveness of meaning which always underlines such ideas as "prosperity," "solidarity," and "common destiny."

acquire not only a general knowledge of the broad trends according to which social structures change, but also understand the causes of these changes, that is, the working of the forces responsible for these changes. (p. 45) He must try to formulate hypotheses about general trends underlying social developments in order that men may adjust themselves to impending changes. (p. 45) Such adjustments may frequently assume the forms and proportions of social planning and social engineering. But the pronaturalistic historicist will interject here that all social planning, even if it should be devised most realistically,[23] is in the final analysis wholly futile if not Utopian, because such planning does not take into account the inexorable laws of social development or "social destiny" which alone bring about social or historical situations. (p. 47) Hence the course of historical development is never shaped, and in fact can never be shaped, by rational planning or theoretical construction, however perfect.[24] All social engineering, therefore, no matter how realistic and intelligent, is doomed to remain a Utopian dream. (p. 47) It is doomed, because it operates on the false assumption that man, by proper planning, can inaugurate a new historical period more or less precisely in the way it has been planned or projected. A new period or epoch has its own intrinsic newness, and this intrinsic newness renders any detailed planning simply futile.[25] (p. 48)

Popper denies that this historicistic view of social development necessarily implies fatalism leading to inactivity. It merely predicts that no social planning, irrespective of its merits, will ever go "according to plan." (pp. 49-50) Only such schemes as are consonant with the main (preordained) currents of history can be effective and, hence, be termed "rational." Thus interpretation of history is the proper task of historicist thinking. Human efforts, then, cannot bring about a better world; neither can they prevent or even arrest the gradual deterioration of the world if it is the world's fate to deteriorate. Activism, which is typical of anti-naturalistic historicistic thinking, must acquiesce in this and restrict itself to helping along the inexorable changes: (p. 51) society will necessarily change, but only along a preordained path that cannot change, and through stages predetermined by inexorable necessity. In sum, pronaturalistic historicism teaches the utter futility of any attempt to alter impending changes or to bring about "planned changes." But this is really a peculiar kind of fatalism — a fatalism in regard to the trends of history. Historicistic pessimism, like historicistic optimism, is based on faith rather than reason. The most reasonable attitude to adopt, pronaturalistic historicism counsels, is to adjust oneself as well as one's set of values to make them conform with impending changes and preordained events. (p. 54)

The central doctrine of the pronaturalistic historicist, Popper points out in his criticism of this position, appears to be the belief that it is the task of the social sciences to uncover the law of evolution of society — the "natural laws" of

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23. By "realistic" Popper means a plan which is both practical and realistic in the sense that it does not conflict with the known facts or laws of social life — that it is backed by an equally practicable further plan for transforming an existing society into a "new society."

24. It is conceded, however, that such rational plans might exert some influence.

25. Such intrinsic newness cannot be "known in advance" (for otherwise it would not be new) and, hence, cannot be planned for.

historical succession — in order to foretell its future. Popper emphatically denies that the search for the laws of unvarying order in evolution is the proper object of the social sciences. (pp 105-108) The evolution of life on this planet, or that of human society, according to him, is a unique historical process; and its description is a singular historical statement rather than a "law." (p. 108) But if we are forever confined to the observation of a unique process, we can hope neither to test a universal hypothesis nor ever to find a universal law: about unique matters or facts there can be no generalizations. Naturally, the uniqueness of the evolutionary or historical process may be denied with the remark, advanced by many philosophers, historians, or sociologists, that the life cycle of birth, childhood, adolescence, maturity, old age, and death, applies not only to man, individual animals and plants but also to societies (States), races, and perhaps even to the whole universe. But if history is cyclic or repetitive, then the laws of the life cycle of civilization, for instance, can be studied and ascertained in the same manner as the life cycle of a certain animal species. (pp. 109-110) Against this naturalistic view Popper argues that instances of "repetition" are quite possible, but that wherever they occur they occur under vastly dissimilar circumstances. Hence we may not reasonably expect of any apparent repetition of a historical event or development that it will continue to run parallel to its prototype.[26] (p. 111)

The pronaturalistic historicist frequently also proclaims that in any evolutionary process, even if it should be unique, we may discern a trend or tendency or direction, and that we may formulate a hypothesis which states this trend and tests this hypothesis by future experience. (pp. 109, 112) Such a trend, we are told, is usually "dynamic": it "moves" by a certain "velocity" under the influence of social or cultural "forces," it has a definite "direction," and it cannot be "reversed" without breaking the "law of motion." These terms, needless to say, are simply platitudinous metaphors. They are in fact instances of an ill-advised misuse of analogies taken from the physical sciences. (pp. 109, 112) But if used with anything like scientific pretensions, they become plain jargon or, more precise, holistic pronaturalistic jargon. The idea of the movement of society itself — the notion that society, like a physical body, can move as a whole thing along a certain (predictable) path and in a certain (predictable) direction — is merely a holistic fiction or confusion. (p. 114) The expectation that one day we may discover the "laws of motion of society" is in vain, because there is no motion in society analogous to the motion of physical bodies. No one will seriously deny that certain trends (or tendencies) in social change exist. But trends are not laws, simply because they lack that universality which is characteristic of laws.[27] Hence

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26. Admittedly, Popper observes (p. 111), once we believe in a law of repetitive life-cycles, we are certain to discover historical confirmation of this "law" nearly everywhere. But if we would examine more closely these confirmations, they turn out to be intentionally selected in support of the theory they are supposed to test. This is true not only with Toynbee, Spengler, and Vico, but also with Plato and to some extent even with Thucydides, not to mention Herodotus.

27. Thus the statement that a certain trend existed at a certain time or place would be a singular historical statement (an "existential statement"), and not a universal law.

we must always stress the basic difference between a law and a trend.[28] (pp. 115-116) Likewise mistaken is the idea, made famous by Comte and Mill, that any concrete sequence or succession of social events can be described or explained by any one law or by any definite set of laws. For there are neither laws of succession nor laws of evolution (p. 117), although there exist evolutionary trends which can be ascertained scientifically.

Trends, as opposed to laws, may never be used as the basis for scientific predictions. Persistent trends may exist (and may also be explained); but their persistence, in the final analysis, depends on the persistence of certain initial conditions (which, in turn, may sometimes be trends). Some historicists overlook the dependence of trends on initial conditions and, as a result, treat these trends (or operate with them) as if they were unconditional like laws. Their confusion of laws with trends makes them believe in trends which are unconditional (and, hence, general) or, better still, in absolute trends, such as the alleged general historical tendency towards universal human progress. This, Popper points out, is the central mistake of pronaturalistic historicism: its laws of development or evolution turn out to be absolute trends, that is, trends which, like laws, do not depend on initial conditions, and which carry us irresistibly in a certain direction into the future. These absolute trends then become the basis of unconditional prophecies. (p. 128) At the same time the historicist firmly, not to say stubbornly, believes in his favorite trend,[29] and conditions under which this trend would disappear are to him simply unthinkable. The poverty of historicism, then, Popper avers, is primarily an appalling poverty of imagination.[30] (p. 130)

Popper's discussion of the "sociological" and "historical" methods (pp. 130-146), which ought to be studied most carefully by every sociologist, historian, and philosopher, is both extremely subtle and informative. Admitting that there are differences between the theoretical sciences of nature and of society, he nevertheless insists that these differences are not so great as some people would have us believe. Among other matters, he also suggests ways of selecting and testing hypotheses.[31] He points out that frequently we have a more direct (intuitive) knowledge of the inside of human nature than we have of the physical world surrounding us.[32] And since we can never do more than exclude certain possibilities, we cannot possibly predict the precise result of any concrete situation.[33]

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28. The traditional habit of confusing trends and laws, Popper observes, together with the intuitive observation of certain trends, inspired the central doctrines of evolutionism and historicism — the doctrines of the inexorable laws of motion in society.

29. Karl Marx, for instance, believed in an absolute trend towards an accumulation of all means of production in a few hands.

30. As a matter of fact, the pure-blooded historicist cannot imagine a change in the conditions of change.

31. If we are uncritical or lack proper information we shall always find what we want: we shall look for, and find, confirmations, and we shall ignore (or distort) whatever might endanger our pet theories. At the same time we are frequently unaware of the fact that we are operating with hypotheses or theories, and we therefore mistake our theoretical models for concrete things.

32. We certainly use our knowledge of ourselves in order to frame hypotheses about some other people or, possibly, about all people.

33. If it is not our problem to find a prognosis but to discover the initial conditions (or some "universal laws") from which we may deduce a given prognosis, then we are

While conceding that the analysis of any concrete social situation is made extremely difficult by its inherent complexity, Popper denies that this concrete social situation is more complex than any concrete physical situation. As a matter of fact, there are good reasons, he insists, not only for the belief that social science is less complicated than physics, but also for the assumption that concrete social situations are in general less complicated than concrete physical situations. This is so because in most, if not all, social situations there is an element of rationality. To be sure, human beings do not always act altogether rationally,[34] but they do act nevertheless more or less rationally. This fact alone makes it possible to construct comparatively simple models of their actions and interrelations, and to use these models as approximations. (pp. 139-141) Hence it might be possible to construct a "social model" on the assumption of man's complete rationality and of man's possession of complete information on the part of all individuals concerned, and of estimating the deviation of the actual behavior of people from the model behavior. (p. 141)

The unity of the scientific method — a unity which relates the social sciences and the physical sciences — can, according to Popper, also be extended, with certain limitations, to the field of the historical sciences. Although history is primarily characterized by its interest in actual and singular (specific) events, rather than in "laws" or generalizations, the historical sciences take all kinds of universal laws for granted. But it should always be borne in mind that if history makes use of such universal laws it does so in the sense that it sees in a singular actual event the cause of another singular actual event (which is its "effect") relative to some universal law. (p. 145) Now one historicist "school" claims that any history which does not merely enumerate facts but attempts to present these facts in some kind of causal connection, must be interested in the formulation of historical laws, especially since causality means, fundamentally, determination by law. Another historicist "school" asserts that even "unique" events may be the cause of other events, and that it is this kind of causation that history is interested in. Popper insists that both "schools" are partly right and partly wrong: universal laws and specific events together are necessary for any causal explanation, but outside the theoretical sciences, universal laws arouse little interest. (p. 146) Obviously, so far as we are concerned with the historical explanation of typical events the latter must always be treated as typical or unique. One of the most important tasks of historiography is to describe events in their peculiarity or uniqueness. But such a description does not attempt to explain causally. Hence the tasks of history or historiography, namely, the disentanglement of causal nexi and the description of the "accidental" manner in which these threads are intertwined, are both necessary in that they supplement one another. (pp. 146-147)

Historicism, Popper concedes, has some justification: it is a reaction against

looking for an explanation. If we consider the laws and the initial conditions as given (rather than as to be found) and use them merely for the deduction of the prognosis (in order to get thus some new information), then we are trying to make a prediction. If we consider one of the premises (either a "universal law" or an initial condition) as problematic, and the prognosis as something to be compared with the results of experience, then we speak of a test of the problematic premise. (p. 133)

34. By "rational" Popper means the making of optimal use of all available information for the attainment of whatever end is envisioned. (p. 140)

the naive method of interpreting political history in terms of the "great men" or the "hero." Historicists rightly feel that there may be something better than this particular method; and it is this realization which makes their idea of the "spirit" — the "spirit of the age" or the "spirit of the nation" — so attractive to many people. Sensible scholar that he is, Popper has no sympathy with this "spirit," be it its idealistic prototype or its dialectical or materialistic incarnation. (p. 149) To him they indicate the existence of some vacuum, of a place which it is the task of sociology to fill with something more sensible. There is room, Popper argues, for a more detailed analysis of the logic of situations (p. 140) which are "responsible" for certain events. At the same time, since in history universal laws are for the most part insignificant,[35] their place must be taken by "a point of view": history must be selective. Hence Popper suggests that we must deliberately introduce a preconceived selective point of view into our history — write that kind of history which interests us — unless we are willing to run the risk of being overwhelmed by a host of unrelated (and meaningless) materials. (p. 150) All available evidence which has a bearing upon our point of view should be considered carefully and objectively.[36] But we need not worry about all those facts or aspects which have no bearing on our point of view. (p. 150) Such a selective approach, which may also be called "historical interpretation" (provided it can be formulated as a testable hypothesis), fulfills the functions in the study of history which is in some ways analogous to the functions of theories in the physical sciences.[37] (p. 151)

Historicism constantly confounds such interpretations with theories.[38] It is quite permissible to interpret "history" or a definite course of events as the history of "class struggle" or as the history of "industrial progress" — all these interpretations are more or less interesting points of view and as such certainly unobjectionable. But historicists, who apparently refuse to admit that there is necessarily a plurality of interpretations, present them as doctrines, "laws of history," or theories, claiming, for instance, that all history is the history of class struggle or the history of industrial progress. And since many historical facts can obviously be interpreted and organized in the light of such doctrines, the historicists mistake this for a true confirmation or proof of their specific theory or "law of history." [39]

Rejecting a reduction of all historical progress or regress simply to "human propensities," Popper shows in one of the most brilliant passages (pp. 152-159) that in order to understand progress we must first attempt to establish the con-

35. If they are used at all, they are used unconsciously.
36. Hence we may not twist the facts until they fit our preconceived selective point of view, but rather we may have to alter and, if necessary, even abandon our preconceived selective point of view if the facts demand it.
37. This is also the main reason why this selective approach has frequently been mistaken for a theory.
38. Popper considers this confusion the cardinal error of historicism. (p. 151)
39. The historians who reject this particular procedure fall, as a rule, into the opposite error: aiming at absolute objectivity they feel bound to avoid any and all selective points of view. But since this is simply impossible, they usually adopt a point of view without being aware of it. The way out of this dilemma, Popper insists, is to have a clear notion about the necessity of adopting a definite point of view; to state this point of view plainly as such; and always to remain conscious that it is only one among many possible points of view. (p. 152)

ditions of progress, or, to be more exact, analyze the institutional conditions of progress. To this end we must try to imagine conditions under which progress could and would be arrested. How, then, can scientific or industrial progress, for instance, be arrested? Simply by closing down or controlling laboratories for research; by suppressing and controlling scientific periodicals or other means of scientific discussion; by suppressing scientific congresses or conferences; by suppressing universities and other institutions of learning and research; by suppressing books, the printing press, writing and, in the end, speaking.[40] Science, and especially scientific progress, needs constant competition between hypothesis and ever more rigorous tests; it is the result not of isolated efforts, but of free and unhampered competition of thought. Competing scientific hypotheses need personal representation: they need advocates, they need a jury, and they need a public. This personal representation must be institutionally organized if it is intended to work efficiently. Ultimately, then, scientific progress (and, for that matter, human progress) depends to a very large extent on political-social factors, on political institutions that safeguard the freedom of thought — it depends on democracy. (p. 155) In this sense "scientific objectivity" is based to an appreciable degree on social (and political) institutions. The intersubjectivity of science and its institutions for the dissemination, discussion, and testing of new ideas or hypotheses, are the safeguards of scientific objectivity.

But despite the best and most efficient institutional organizations in the world, scientific progress may stop one day for a number of reasons.[41] Even near-perfect institutions can never be considered absolutely foolproof: they must be well designed and properly manned. But we can never be sure that the right men will always be attracted by scientific research and scholarship. Much depends on sheer luck in these matters. Conversely, the human factor or the "propensities of human nature" will always remain to a certain extent the "irrational factor" in most and perhaps even in all institutional (social) theories (and also in all of human history). This human factor is the ultimately uncertain element in social life and in all social institutions. It is that element which ultimately cannot completely be controlled by institutions.[42] Psychology, Popper contends, cannot possibly furnish the basis of social science: first, because it is itself but one of the social sciences; and, secondly, because the social sciences are largely concerned with the unintended consequences or repercussions of human actions. But if the growth of reason — knowledge and human rationality — is to survive, the diversity of individuals, and individual opinions, aims, and purposes must never be interfered with.[43] The historicist or evolutionist who demands the "scientific"

40. Also such devices as the suppression of scientific knowledge for "reasons of national security" by labelling it, for instance, "Top Secret," can in the long run seriously harm and even arrest scientific progress.

41. Such a possibility, Popper hopes (pp. 156-157), may perhaps be counteracted by devising a further set of social institutions, such as educational institutions, to discourage, among other matters, uniformity of outlook and encourage diversity of thought.

42. This, to be sure, is the source of great solace in times when all sorts of drastic attempts are being made to submerge (and subvert) "human nature" in and through "institutions."

43. Popper insists that even the emotionally satisfying appeal for a common purpose, however excellent and praiseworthy, can become an appeal to abandon diversity and, hence, abandon rational thought. (p. 159)

control of human nature does not realize how suicidal his demand is: the mainspring of evolution and progress is the variety of the materials which may become subject to selection. Human evolution in a way is also "the right to be wrong," the "freedom to be odd and unlike one's neighbor, the privilege to disagree with the majority, and go one's own way."[44] Holistic control, which must lead, not to the equalization of human rights but to the Procrustean conformity of human minds, would mean the end of all progress. (p. 159)

In his conclusion Popper stresses the great antiquity of historicism. Its oldest form, such as the doctrines of the life cycles of clans, cities, or races, probably coincides with, and perhaps precedes, the earliest and most primitive theological belief that there are hidden purposes behind the apparently blind decrees of a merciless fate. This barbaric belief has left unmistakable traces upon modern historicism, which apparently still holds that we are being swept into the future by a tide of irresistible forces.[45] It would also explain why the essentially antique, tottering, and dismal philosophy of historicism is often (and successfully) proclaimed as the latest and thus the greatest revelation of modern science.[46]

This review has been written in terms of a report seeking out those passages which in the opinion of the reviewer most tellingly present the mature and well-thought-out ideas of a great scholar and a truly profound thinker who has reserved for himself the right "to be unlike one's neighbor," and "the privilege to disagree with the majority, and go [his] own way." Much must be left unsaid here. But for the record, the obvious should be stated: Popper's is a brilliant and arresting book which no philosopher, sociologist, or historian can afford to ignore. Whether or not the reader agrees with the author[47] — and it is to be expected that many people will reject and even denounce his views — no honest person can dispute the fact that Popper has made an immensely scholarly contribution to the methodology (and philosophy) of all future historiography, theoretical sociology, and philosophy of history.

ANTON-HERMANN CHROUST

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44. WADDINGTON, THE SCIENTIFIC ATTITUDE 111; 112 (1941). It should be noted that similar ideas were already expressed by Pericles in his famous *Funeral Oration*. See Thucydides 2.37-40.

45. Modern historicists, as a rule, seem to be blissfully unaware of the great antiquity of their theories of history. They are of the opinion that their particular brand of historicism is the newest and boldest achievement of the human mind. See, for instance, Toynbee, Spengler and, most recently, the ambitious work of ERIC VOEGELIN, ORDER AND HISTORY (Baton Rouge, 1956 ff.). See the reviewer's discussion of Voegelin, 21 THE THOMIST 381 (1958).

46. Popper suggests here (p. 161) that it might be fear of change — the Platonic fear and hatred of all change — which makes historicists and "philosophers of history" so incapable of reacting rationally to criticism, and which makes others only too frequently responsive to their dismal teachings.

47. It will be noted that Ludwig Freund, in his excellent article, *Vom Sinn und Unsinn der Theorien über den Gesellschaftswandel,* 43 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 21 (1957), likewise deplores and denounces the lack of scientific methodology in the traditional forms of "historicism." A refreshing and at the same time critical attitude toward certain types of "historicism" is taken by JOHN K. GALBRAITH, THE AFFLUENT SOCIETY (Boston, 1958).

REVELATION, NATURAL LAW, AND THE THOUGHT OF REINHOLD NIEBUHR. Reflections Prompted by LOVE AND JUSTICE: SELECTIONS FROM THE SHORTER WRITINGS OF REINHOLD NIEBUHR. Edited by D. B. Robertson. Philadelphia: Westminster Press, 1957. Pp. 309. $6.00.

This volume is a collection of sixty-four essays, most of them journalistic in character, written from the mid-twenties to the mid-fifties, and dealing with a wide range of topics. Problems in ethical theory, domestic and foreign politics, the United Nations, war and pacificism, economics, race relations, and the atom bomb — all these are treated with unfailing intelligence and ethical passion. Yet these articles are only a sampling of the flood of occasional writings which pour from Niebuhr's pen. However, it is a good sampling and so displays his central interests perhaps even better than do his longer works.

Niebuhr is forever struggling to make Christianity socially relevant, to make Christian ethical insights bear on the urgent public issues of the day. It is out of this concern that his more specifically theological writings have grown. Thus, as he himself insists, even his *magnum opus, The Nature and Destiny of Man,*[1] is to be understood not primarily as the work of a theologian but as the effort of a man concerned with action to clarify the ethical and theological basis of his social and political work. What results is often superb theology — at least from the Protestant point of view — but unless one remembers its practical roots, one will never understand Niebuhr's tremendous public impact. He has been described as "the Christian theologian most quoted by secular sociologists and publicists in the United States and Great Britain today."[2] Arthur Schlesinger, Jr., says that "he helped accomplish in a single generation a revolution in the basis of American political thought."[3]

Yet it would be impossible on this occasion to review in detail Niebuhr's analyses, brilliant as they often are, of such diverse subjects as "The Ethic of Jesus and the Social Problem," (29-40) "Catholicism and Anarchism in Spain," (73-77) "Jews After the War," (132-142) and "The San Francisco Conference." (213-216) Instead, I shall refer to his other writings in order to characterize the ethical basis of his treatments of these and other specific problems.

Such a characterization can perhaps best be developed by comparing the Niebuhrian social ethics to the two major contemporary Christian alternatives. One of these, that of natural law, is familiar enough to readers of this journal. The second, dominant in Continental Protestant circles, is easily caricatured as being simply a blind plunge into faith, but it is much more than that. It is primarily an effort to construct an adequate ethics on the basis of Christian revelation. It assumes as quite self-evident that the metaphysical, epistemological, and theological postulates of traditional natural law theory are invalid. There is no

1. Two volumes (New York: Scribner's, 1941 and 1943). Since 1949 Scribner's has had in print a one-volume edition of these Gifford lectures.
2. D. R. DAVIES, REINHOLD NIEBUHR: PROPHET FROM AMERICA 70 (London, n.d.).
3. *Reinhold Niebuhr's Role in American Political Thought and Life,* in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL AND POLITICAL THOUGHT 150 (Ed. C. W. Kegley & R. W. Bretall, New York, 1956).

unchanging human essence determinative of the moral good; further, even if there were, it is doubtful that reason could know it; and, lastly, because nothing can be identified as "natural" in the traditional sense, we cannot distinguish two levels of duties and virtues, the natural and supernatural. All other philosophical attempts to discover universal norms, whether Kantian or idealist or utilitarian, are equally suspect. Yet these negations are merely preliminary, for the major effort is concentrated on making clear that, despite the inadequacy of reason, Christians are not doomed to moral nihilism. Revelation supplies guidance in all areas, including that of social ethics.

There are different ways of constructing a systematic ethics on this revelationist foundation. One group finds an approximation to natural law in what revelation, supplemented to an indeterminate degree by reason, tells us about the "orders of creation"; but as these have been distorted by sin and history, they must be understood as pointing towards a sometimes unobtainable ideal instead of being, as is "nature," the basis for universally binding moral prescriptions.[4] Others are doubtful about even such attempts to relate ethics to structures immanent in human life, and develop what has come to be called a "Christocentric" position. For instance, Karl Barth argues that human relations should in certain ways be analogous to the revelation of God in Christ to the world, and from this he attempts to derive the norms of political justice.[5] There is a note of fantasy — or, more charitably, poetry — in this procedure which contrasts sharply with the more sober and familiar approach through the orders of creation. Yet, as could be expected, both types of ethics are agreed in being partially "situational" or "existential." Thus, in reference to many moral problems for which traditional natural law teaching provides definite injunctions, they insist that the Christian can only search in faith, love, and obedience to discern what is the special will of God for this or that particular historical or personal circumstance.

At first glance, Reinhold Niebuhr appears to share the European Protestant impatience with the natural law tradition. He attacks it in this volume (46-54), and in many other places because, first of all, its concepts "do not allow for the historical character of human existence." There is "an historical elaboration of man's nature" [6] so that "fixed historical structures and norms . . . do not in fact exist" and "the moral certainties of Catholic thought are all dubious." [7] A second criticism is that "Catholic thought . . . fails to do justice to the positive character of the sinful element in all human definitions and realizations of natural justice." Thomistic definitions of justice are in part " 'rationalizations' of a

4. Two major examples of this approach have been translated into English: EMIL BRUNNER, THE DIVINE IMPERATIVE (Philadelphia, 1947); and WERNER ELERT, THE CHRISTIAN ETHOS (Philadelphia, 1957).

5. *Christengemeinde und Bürgergemeinde,* 7 KIRCHE FÜR DIE WELT 32-42 (Stuttgart, 1946). Translated in AGAINST THE STREAM (New York, 1954).

6. *Reply to Interpretation and Criticism,* in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL AND POLITICAL THOUGHT 435. Henceforth this essay will be cited as *"Reply."*

7. NATURE AND DESTINY OF MAN I, 172. It is doubtful that Niebuhr fully means what he here asserts, for in arguing against modern relativism, he cites the near universality of prohibitions against theft and murder as evidence of enduring structures and norms. Further, against Kinsey he points out that the organic relation between the physical and spiritual dimensions of man means that sexual relations are always also personal.

feudal aristocracy's dominant position in society," while eighteenth century natural law theories "justified the bourgeois classes in their ideals." (48-49) The third major objection is to the view that "natural justice is good as far as it goes, but it must be completed by the supernatural virtue of love." Niebuhr affirms, "the true situation is that anything short of love cannot be perfect justice." (49)

Thus the basic metaphysical, epistemological, and theological affirmations of natural law all seem to be rejected. There is no fixed essence, for the structures of human existence change; such structures as there are cannot adequately be defined by reason, for its insights are distorted by self-interest and historical bias; and, lastly, the distinction between natural and supernatural levels of morality must be denied, because the rules of justice "are specifications of the law of love and do not have independence apart from it." [8]

Yet over against this indictment of natural law must be set Niebuhr's emphatic and repeatedly elaborated affirmations that "men are not completely blinded by self-interest or lost in this maze of historical relativities. . . . What remains with them is the law of love, which they dimly recognize as the law of their being, as the structure of human freedom, and which, in Christian faith, Christ clarifies and redefines." (53) This certainly appears to be a natural law position. There is a law, rooted in the very nature of man, which men can and do apprehend apart from revelation. It is true that his description of the basic content of this law differs from that of most of the tradition. But is this not really a material difference within a formal and fundamental agreement?

I think the proper answer to this question is "yes," but in saying this I am uncomfortably aware of the danger of so broadening the notion of natural law that it comes to embrace all possible ethical positions. As Professor Paul Ramsay of Princeton University points out in the most comprehensive study so far made of the natural law elements in Niebuhr's thought, "any conception of the nature of man is so far a conception of the natural law." [9] Thus even Jean-Paul Sartre affirms, "When in all honesty I've recognized that man is a being in whom existence precedes essence, that he is a free being who, in various circumstances, can want only his own freedom, I have at the same time recognized that I can want only the freedom of others." [10] Here the very freedom which is said to destroy entirely a fixed essence, is still an immutable fact of human nature which is of decisive ethical significance. Niebuhr seems to go almost as far in his emphasis on mutability: "There is not much that is absolutely immutable in the structure of human nature except its animal basis, man's freedom to transmute this nature in varying degrees, and the unity of the natural [i.e., 'animal'] and spiritual in all the various transmutations and transfigurations of the original 'nature.'" [11] "Insofar as man has a determinate structure, it is possible to state the 'essential nature' of human existence to which his actions ought to conform and which they should fulfill. But insofar as he has freedom to transcend structure, standing

8. *Reply* 435.
9. *Love and Law*, in REINHOLD NIEBUHR: HIS RELIGIOUS, SOCIAL AND POLITICAL THOUGHT 82. Cited henceforth as "RAMSAY."
10. EXISTENTIALISM 15 (New York, 1947). Quoted by RAMSAY, *loc. cit.*
11. FAITH AND HISTORY 183 (New York, 1949). Quoted by RAMSAY 93.

beyond himself and beyond every particular social situation, every law is subject to indeterminate possibilities which finally exceed the limits of any specific definition of what he 'ought' to do." [12]

In the light of such statements, it may seem strange that Niebuhr is surprised by "the charge of relativism or affinity to modern existentialism." [13] The explanation is that the whole temper of his thought is opposed to such trends. He emphasizes human freedom in order to stress the universal obligation to love, not in order to release from all except spontaneously adopted obligations, as does Sartre. He says there is only one moral absolute, yet his intention is not to relativize ethics as much as possible, but to relate all duties to love.

Speaking more precisely, one could perhaps say that it is the teleological element, the notion that man is essentially directed towards a definite perfection of nature, which makes Niebuhr into a natural law thinker despite himself. Love is "a vision of health which even a sick man may envy, as the original righteousness which man does not possess but knows that he ought to possess." [14] As Ramsay puts it, man is "made for life-in-community whose quality is love." [15] It is only in such a life that there can be a "proper functioning of the total personality." [16] Implicit in such statements is the specifically natural law concept of man as essentially directed towards a determinate *telos*. Other conceptions of essential nature, such as the existentialist or utilitarian, also determine characteristic notions of the moral good; but these goods, freedom or pleasure, do not specify a final and unsurpassable goal of ethical activity. In contrast, love as described by Niebuhr does precisely that.

In summary, then, Niebuhr believes that man's self-transcendence is so radical that it can alter all the social and historical structures of human existence. There is, therefore, only one law which is fully and immutably adequate to man's freedom, the law of love. This is not a set of fixed precepts, and so it alone can guide man among the "indeterminate possibilities which finally exceed the limits of any specific definition of what he 'ought' to do." [17]

It would be a mistake to conclude from the last sentences that Niebuhr's final word is simply, "Love, and do what you will." For one thing, he does an admirable job of giving genuine content to the notion of love. Furthermore, his constant effort in all his works is to relate love to the problems of the world. He argues that the principles of justice are always specifications of the law of love. Thus, for example, the regulative principle of justice is equality, for "thou shalt love thy neighbor as thyself" (Mark 12:31) implies that every man has just as much right to the opportunities and privileges of the common life as do you yourself. To be sure, inequality arises in every society both because of sinfulness and because of diversity of social functions, but equality nevertheless remains the principle of criticism, inspired by love, which justifies the struggle against in-

12. *Love and Law in Protestantism and Catholicism,* CHRISTIAN REALISM AND POLITICAL PROBLEMS 154-55 (New York, 1953). Quoted by RAMSAY 89-90.
13. *Reply* 435.
14. NATURE AND DESTINY OF MAN I, 287.
15. RAMSAY 84.
16. NIEBUHR, CHRISTIANITY AND SOCIETY 27 (1948). RAMSAY 86.
17. *Supra,* note 12.

ordinate privileges, and which reminds us that our special advantages are not absolute rights but rather the accidental products of history and nature.[18] (54) Perhaps Niebuhr's main contribution has been in such analyses. He has shown that the relating of justice to love need be neither vague nor sentimental, but can rather guide and motivate the most realistic and morally sensitive social action. Founding justice in love has, furthermore, the great advantage of being far more persuasive to modern readers than are appeals to Aristotelian formulations of the principles of commutative and distributive justice. Those aware of the emphasis on the "natural" importance of love found in such depth psychologists as Menninger, Fromm, and Horney are particularly impressed.

As the primacy which Niebuhr accords the "law of love" is his central divergence from traditional natural law teaching, it is important to note that this tradition is far more open to the Niebuhrian emphasis than he himself realizes. Joseph Fuchs, S.J., deals with this issue in what is probably the most comprehensive recent treatment of the theological problems connected with natural law.[19] He is just as opposed as Niebuhr to the notion that love is simply a supernatural addendum to natural righteousness, or to the view that the natural order is simply one of justice and that the love which completes and perfects it is exclusively supernatural. (p. 158) Rather, nature also requires love of God and neighbor. (p. 161) The inner meaning of justice is love, and justice fulfills itself in love. (p. 162) Love belongs as much to the natural as to the supernatural order, and forms and perfects every virtue in its own domain. (p. 165) Supernatural, Christian love differs from the natural, not in what it demands, but because of the fact that it is love with a new power, bestowed by God, formed in the image of the love of God revealed in Christ. (p. 162) Such statements would not perhaps wholly satisfy Niebuhr, for Fuchs holds that certain principles of natural justice can be discerned independently of any reference to love, but they certainly go a long way towards meeting his objections.

This raises the question of the degree to which Niebuhr's two other criticisms of the natural law school may also be based on misunderstanding. His first complaint about the absolutizing of the historically relative simply does not apply to certain of the recent treatments of social and political ethics. Thus Fuchs, adapting an old distinction, sharply divides between the "absolute" and "secondary" natural law. He then says, "People often ask about the state, economy or legal system which is 'good in itself.' Absolute natural law has something to say about this, but what it says is relatively general, contentless, and formal: what is needed is a more precise specification of the historical situation." (p. 94) This, it seems, is pretty much what Niebuhr would say. However, real differences on this question of relativity would no doubt emerge if we were to consider family and sexual ethics (on which, by the way, Niebuhr has written little). Yet even here some agreement in principle, if not in conclusions, could be found with those who share the viewpoint expressed by the distinguished English Catholic philosopher, D.J.B. Hawkins: "In the matter of sexual morality it is not enough to consider an ac-

18. Cf. An Interpretation of Christian Ethics 109-10 (New York, 1935).
19. Lex Naturae: Zur Theologie des Naturrechts (Düsseldorf, 1955).

tion as wrong simply because it frustrates the natural purpose of the sexual faculty; an action is proved to be wrong only if it frustrates the nature of man. Such an argument can and, indeed, must be used to justify the traditional sexual morality. . . ." [20] Niebuhr also would insist upon this approach, even though he might doubt that it would lead to all the desired conclusions.

Niebuhr's last objection is that the Catholic natural law tradition seriously underestimates the extent to which the rational apprehension of natural justice is corrupted by sin, distorted by self-interest. This criticism seems to overlook the distinction between reason as a potency, and the actual use of reason. Although the natural capacity for rational insight into moral truth is said to be intact in fallen man, it remains an open question as to how far sin, apart from any healing influence of revelation, grace or faith, prevents the actual exercise of this faculty. Fuchs accords much more actual power to sinful reason than do some writers,[21] but he does admit that other views are possible: "The teaching of the Church . . . appears not to deny that perhaps all our knowledge of natural law is traceable back to divine revelation. . . ." [22] (p. 154) Of course it must be insisted that even when such knowledge is occasioned, or made possible, through revelation or faith, it is still grounded in reason and so genuinely natural. (p. 56)

There is, therefore, room within Catholic natural law teaching for a greater stress than Niebuhr's on the corruption of moral reason. He is not only willing, but eager, to grant that men, even apart from revelation, can be uncomfortably aware that love, including even the sacrificial aspect which Christ manifests, is the true law of their being. He would, of course, be impatient with any attempt to demonstrate rigorously that this is so to those unwilling to admit it; but then, even the pagan Aristotle agrees on the futility of trying to induce moral knowledge by argument in those who lack the proper dispositions. In short, the sort of belief in "an uncorrupted bit of reason," (p. 53) which Niebuhr thinks characteristic of natural law, finds more support in Enlightenment rationalism than in the older tradition.

Our conclusion, then, is that a writer whose references to natural law are generally critical, and who rarely has a kind word for Aristotle or St. Thomas Aquinas, is actually continuing that tradition in the modern world. Those who are convinced that this is indeed the "natural" road to moral knowledge, will not be surprised to discover a stranger walking in the way, and will be eager to learn from a man who makes old truths speak the language of the present.

GEORGE A. LINDBECK

20. *Nature as the Ethical Norm,* 16 AQUINAS PAPER 15 (London: The Aquinas Society, 1951).
21. E.g., Henri de Lubac, H. U. von Balthasar, and, perhaps, Karl Rahner.
22. For instance, to give an example for a point which Fuchs does not bother to illustrate, there is presumably nothing contrary to dogma in the Patristic theory that the pagans derived what they knew of moral goodness from the Old Testament patriarchs and from Moses.

SOVEREIGNTY. An Inquiry into the Political Good. By Bertrand de Jouvenel. Chicago: University of Chicago Press, 1957. Pp. xii, 319. $4.50.

This is one of the most substantial books in political theory in the last decade. Together with the author's previous *Power* and his critical editions of Rousseau's *Social Contract,* this book places Bertrand de Jouvenel with George Catlin, E. H. Carr, and Walter Lippmann among leading living political theorists.

Sovereignty is the work of a man who has spent a long time with the classics of Western thought. In many cases, with non-Catholic writers especially, he has approached them with little reliance on established critical conventions. And as De Jouvenel has a direct and piercing gallic mind of the stamp we associate with the greatest of the classic *dilettantes* (in the original honorific sense of that word), the result is a series of chapters on some of the fundamental problems of political theory which are usually refreshing and always stimulating.

Sovereignty is a work that demands to be taken seriously. For reasons which will become clear later, its significance is enhanced by the advent of De Gaulle to power and the dismantling of the Fourth Republic. De Jouvenel's writings may be used to great advantage in the attempt to place De Gaulle's forceful epilogue to traditional French constitutionalism in the larger historical perspective of the present crisis in Western liberal democracy. For the result of his book is to provide a defense for secularist economic liberalism divorced from the secularist political tradition of classical liberalism. In place of the political doctrines of traditional liberalism is substituted a revitalized conception of authority which draws its support from orthodox Catholic doctrines of natural law. Personalized notions of authority, will, and virtue take the place of the positive, structural, and depersonalized ingredients of traditional liberal theory. The theoretical backbone of the work is Thomist. However, St. Thomas' formal analysis is disregarded. The additional borrowings and engraftings are extensive. They come from such varied sources as Plato, Rousseau, and some of the more recent findings of anthropology, these latter adapted to the sociological tradition of defenders of the *ancien regime* such as Bossuet and De Maistre. All this, buttressed by a series of logical investigations which are sometimes closely reasoned and always interesting, leads De Jouvenel to conclude that the chief assumptions of political liberalism are indefensible, though its policy conclusions can be accepted. The result is a vastly expanded role for the charismatic leader in politics together with an identification of political science with moral science, or, as De Jouvenel feels justified in restating on the last page: "political science is a natural science dealing with moral agents."

The book opens with an attempt to define and distinguish things political. From this there emerges a discussion of leadership and authority. This accomplished, attention is shifted from individual political relationships to an analysis of groups, their formative and cohesive principles. Part II then deals with justice, or the "political good." This is the core of the book. Next, the traditional subjects of allegiance, sovereignty, and law are treated. The conclusion is that political justice consists not in an arrangement of things, but in a condition of will. From this Part III delves into prerevolutionary customs and develops implied

moral and spiritual restraints on sovereign will. All this has implications for the notion of liberty, which is taken up in Part IV. From discussions of "the political consequences" of Descartes and Hobbes there emerge revisions of traditional liberal notions of liberty.

The opening pages of *Sovereignty* outline a special way of looking at individual relationships which is relied on frequently throughout the book. This is introduced with a criticism of any effort which tries to design a picture of political relationships Crusoe fashion by starting with the isolated, solitary individual. Despite this, De Jouvenel's corrected picture is equally individualistic in being based on a series of individual relationships. It is theoretical equality, not individualism, to which he takes exception. To visualize political society, he suggests, conceive of a given individual as being represented by a dot on a piece of paper. This individual has relationships with other individuals around him (other dots); and these relationships may be shown by drawing lines between him and all other so related dots, and ending these with arrow points to show the direction of the relationship. It is then suggested that if one were to take a real individual and make an empirical survey of his relationships for one week there would result a great density of dots and connecting lines. The lines of greatest density (repeated relationships) would reveal his "neighbors." Single lines would point out nonrecurring relationships and these would reveal the "strangers."

Next, one takes each "neighbor" and does the same. It is assumed that in all such cases one will come to the end of each one's neighbors and the revelation of each one's strangers. It is further assumed that if this process is carried out extensively one of two things will happen: either the number of neighbors will expand or the neighbors will circle back on one another. If the first condition happens, the social order is termed "divergent." If the second, it is termed "convergent." Contemporary Western societies are called divergent; primitive societies are called convergent. Moreover, the dots which send out the most arrows will be the political loci of the group. As a number of fundamental conclusions about empirical social orders are drawn from this scheme, it requires closer inspection.

It is not clear whether De Jouvenel intends his system of dots and dashes as an empirical generalization or as a theoretical model. Empirical generalizations may help draw our attention to new empirical conditions which might otherwise have been overlooked. However, the test of validity is always an empirical one, not a logical one extrapolated from the initial empirical generalization.

As an empirical generalization De Jouvenel's view of politics has serious difficulties. It is no less individualistic than the Robinson Crusoe assumptions of traditional liberal contract theory. It merely looks at a connected series of individual relationships. The statistical frequency of individual contacts may mean nothing. By this test postmen and delivery boys would be revealed as the loci of American political power. Moreover, one cannot "see" a prescriptive norm (such as a law or a custom) from an empirical chart of behavior. From empirical generalizations one "sees" only statistical norms. For example, John Bartlow Martin made an empirical survey of the administration of American laws against murder and concluded that where capital punishment is in force only poor people are actually

awarded the death penalty. However, one is not justified in concluding much about the law of murder from this correlation between wealth and punishment. Nor does it follow that the law of murder is insignificant or ineffectual. It is merely that law cannot be seen in this fashion. Yet the prescriptive norms of every culture have large political significance in the kind of situation De Jouvenel describes. For every society stipulates the conditions under which contacts may be inaugurated between individuals. These norms will skew behavior in numerous ways. Rudimentary principles of anthropology teach us that knowledge of the norms relating to social relationships is necessary before we can evaluate the behavioral statistics of any group. Again, isolation or social distance is fully as important a characteristic of political leadership as is social involvement. This qualitative factor cannot be observed from his empirical picture.

An even more serious trouble with De Jouvenel's political diagram as an empirical picture is that it personalizes political relationships. This points to a difficulty that persists throughout the book and the point needs making now, because this is where the distortion starts. For it is not necessary to deny any significance to a personalistic view of politics to point out the distortion of a view that is *entirely* personalized. Nor does the fact that the deceptive enticement of the personalized approach is seldom avoided mitigate the errors it entails. For the only empirical evidence we have about politics is from people. They are the actors. When they report political events to us they report what they and other persons did. Memoirs and biographies of political figures are among the prime source materials of politics. Individual choices and actions are the raw materials presented to us for analysis. Political figures take great pains to tell us why they made certain crucial moves and how important it was for the outcome that someone else who might have made an erroneous choice was not in their shoes at the critical moment. Yet, in defense of their actions they also prove to us why the situation was such that no reasonable man could have taken a different action. Only *their* moves were in the cards. And it is obvious that the situational environment — the "logic of the situation" — of any course of action must have an important effect on the political choices made by individuals. Otherwise we term them ridiculous and quixotic. However, any view of politics which is exclusively personalistic at the expense of describing the logic of the political situation is certain to produce a false view of politics which can be compared to the anthropomorphic vanity with which history inevitably is painted by even deservedly great leaders such as Winston Churchill. And if one starts out, as De Jouvenel does, with an anthropomorphic picture of political relationships, this is all that will be seen. This is his gravest error and it permeates the book.

A separate series of difficulties follows if De Jouvenel's picture of political relationships is assumed to be a theoretical model as distinguished from an empirical generalization. One of the chief functions of a theoretical model is to permit the derivation of logical conclusions. However, these conclusions are always properties of the model, not of reality. To confuse them with empirical conditions is to court the old reification error. We may hunt till we find some empirical conditions sufficiently congruent to the model to warrant the application of its conclusions to reality; we may be able to tinker with reality a little

to make it fit the model (this is the political use of models); we may use the model heuristically, to draw our attention to problems not otherwise conceivable. But in every case validity for our operations depends upon our constant awareness of the distinction between the formal properties of the model as against the empirical conditions for which it is devised. There is no sign of such awareness in the book. Its theoretical sophistication does not proceed beyond the level of Aristotelian morphological empiricism. Finally, De Jouvenel's diagram of relationships is inapplicable to a bureaucratic culture with its characteristic proliferation of relationships between functions as such, rather than between the personal agents of these functions.

* * *

One of the best sections of the book results from De Jouvenel's attempt to define things "political" and to distinguish them from things "economic." First he states that when people have a political concern it is a concern over the "who" involved in action rather than the substantive task to be done. This involves the notion of legitimacy, for one may complain about a given action if it is done by an improper "who" but not if it is done by the legitimate "who."

Next it is said that economics is concerned with "the good employment of resources." But "whenever the help of other men is a necessary condition of . . . attaining [an] aim," behavior has a "political complexion."[1] Thus, "politics occurs whenever a project requires the support of other wills — to the extent to which its author sets out to rally those other wills."[2] This means that politics

1) Is a leadership-centered project.
2) Is collective, or otherwise it would be economics.
3) Is characterized by an "author" who actively rallies other wills (and presumably actions). A rallying author is the crucial factor. "Any action tending to rally wills is, in kind, a political action. . . . It is a technique for increasing the human energies at our disposal by rallying other men's wills to our cause."[3]
4) Involves no contractual element. The whole book is in a sense an effort to discuss politics without relying on contract theory.

The first point is that this is, despite the writer's apparent wish, an individualistic approach. It deals with individual rallying. Secondly, it is not at this point concerned with the "how" of political action — with the nature of a collectivity as such — but rather with the generation of a cooperative project. In the process described there is a distinction between material and human resources. This distinction becomes the real test of whether a project is "economic" or "political." If it concerns the rallying of material resources, it is economic. If it concerns the rallying of human resources, it is political.

This distinction will not hold up in theory. The most powerful proof of this

1. Bertrand de Jouvenel, Sovereignty 16 (1957).
2. *Id.* at 17.
3. *Ibid.*

is found in the analytical development known as game theory. Game theory is a mathematical extension of neoclassical economic theory of the firm purporting to reduce decision-making problems to a mathematical formula through assumptions which permit constructing a static individualistic equilibrium model for the analysis of situations in which the choices of all competitors may affect the outcome and all competitors rationally attempt to minimize their maximum losses with imperfect knowledge about their opponents' strategies. This type of analysis is capable of extension to a wide range of problems in sociology, diplomacy, and political science as well as in economics. In general it is applicable to any theoretical system maintaining individualistic assumptions. It is applicable to systems relying on individual goal-seeking, such as that associated with Talcott Parsons. It is applicable to many types of power analysis when the analysis concentrates on relations between discrete power units in competition for scarce values, regardless of whether the power units are individual persons or collective units. On this basis it has been argued that all such activity is basically allocational and that in theory the same principles apply to economic as to political allocational behavior. Turning it around, there is no theoretical basis for a distinction between the rallying of political as distinguished from economic resources. There is no way out of this impasse short of abandonment of the noncontractual individualistic starting point.[4] De Jouvenel's distinction between economics and politics will not hold up. He has merely substituted men for materials as the scarcities and discussed the profit which is possible through organizing others. Men are considered as means to the end desired by the leader. It is essentially economic theory politicized. The fallacy is that he says nothing about the nature of organization per se. Had he concentrated on the characteristics of organization rather than on entrepreneurial rallying activity he might have gone on to make valid distinctions. A partial correction of this error occurs in later sections dealing with group theory.

* * *

"The keeping together of a team of human beings" is said to be harder than inauguration of the team. As "conservation is a harder task than construction"[5] its problems will be "political." Rallying political action is now termed "additive" when it results only in temporary organization, "aggregative" when it results in conserved organization. "Pure" politics is the action of politicians who engage in additive or aggregate work for their own sake rather than for the benefits possible from the achievements of an organization.[6] The one who wins out in these actions is the "sovereign." "Sovereignty is the visible sign of an inner conviction held by members of an aggregate that their aggregate has an absolute value."[7]

4. A fuller discussion of this problem occurs in Harvey Wheeler, "Appendix," *The Political Limitations of Game Theory,* 10 WESTERN POLITICAL QUARTERLY 669-74 (1957).
5. DE JOUVENEL, *op cit. supra,* note 1 at 19.
6. This is never satisfactory and is later abandoned with the proposition that "it is a condition of successful 'pure politics' that an ethic finds a place in them." (p. 25) But politics devoted to an ethical end is no different from politics in general and is thus no longer "pure," according to De Jouvenel's definition of pure politics.
7. DE JOUVENEL, *op. cit. supra,* note 1 at 21.

It is immediately apparent that politics has become quite mystical. The definition of sovereignty is strongly reminiscent of a sacrament or a state of grace. The sovereign, like the political leader, is one who is able to inspire this mystical feeling in others. He is essentially charismatic, the possessor of a highly attractive personal magnetism. His "authority" derives from his "capacity" to found aggregates, that is, his "ability to cause others to act." [8] One who can do this is an "auctor." His resulting "power" is the *"vis politica"* which is the "causative force of every social formation."

Vis politica has three aspects: "capacity to bring into being a stream of wills," "capacity to canalize the stream," "capacity to regularize and institutionalize the resulting cooperation." From the first of these are derived capacities of initiation and propagation. From the second and third it follows that "the man who leads into action a stream of wills . . . is *dux* [additive] . . . The man who institutionalizes cooperation is *rex,* the man who regularizes or rules" [9] [aggregative].

The analysis rests everything on the actions and abilities of individual leaders who are known as *auctors, dux* and *rex.* Thus it is necessary to say what it is that distinguishes these types of men from other men, for not all men have these abilities in the same degree. Otherwise, they would be leaders too, for there is no situational factor in the analysis. It is merely stated that politics assumes that most men will not be leaders, and then accounts for this by special faculties possessed by leaders.

It follows that essential to the understanding of politics is the understanding of the *vis politica* possessed by the leader. As this is a personal faculty it is not wrong to term the result a system of "facultative politics" directly comparable to seventeenth-century facultative psychology. Paracelsian medicine involved analogous biological notions. In order to show this I have collected most of the descriptions used by De Jouvenel in trying to state the essence of the political capacity. At various times the political leader is the one who has "a *flair* for recognizing whatever currents of will are astir in society, that he may use them to carry him on." He has *"the additive talent,* which enables him to dispose men favorably to his person." He has "a *force of attraction.*" This becomes quite fanciful: "centripetal attraction is exerted by a modal centre, such as a dynasty, which is always visible and always operative . . . that auctor has laid weak foundations who has not intermarried the associates. The intimacy established between them must satisfy material, sentimental and moral needs." [10] De Jouvenel here apparently intends us to think in terms of Paracelsian prescriptions for finding the *vis potentia* of biological processes. Nor does this exhaust his probing the mysteries of the *Arcana Imperii.* An auctor is one who is *"apt* to receive impulsions," [11] one who has the *"impulsive power,"* one with *"natural ascendency"* [12] contained in a *"capacity* below the level of consciousness," [13] one who takes ad-

8. *Ibid.*
9. *Ibid.*
10. *Id.* at 22 and at 3.
11. *Id.* at 30.
12. *Id.* at 31.
13. *Id.* at 32.

vantage of the "mysterious operation of his *special virtue,*" [14] one who has *"natural seigniory,"* [15] one who incorporates the "principle of *formative attraction*" [16] in a "manifest and immediate presence," [17] relying on a *"natural disposition* to obedience" [18] as well as on his own "power of affection." [19] So long as power is conceived of as a substance possessed by the leader something like this difficulty always follows. It is only avoided by conceiving of power as a relationship.

Just as Gilbert imagined magnetic fields to be produced by the willful souls of iron particles, so De Jouvenel imagines politics as a magnetic field of affective and receptive wills creating a "hub of authority" because "propositions emanating from a certain source exercise a positive influence on the actions of certain men who are . . . for that reason within the 'area of authority' [20]. . . . I act as Primus wants me to act," explains De Jouvenel, "because he has infused his will into mine." "Natural authority has the pull for me of a lover; it is an attraction bound up with my liking for Primus." [21]

However appealing and analogically resourceful we may find this, it gets us nowhere. Politics is defined in terms of leaders. Leaders are defined in terms of politics: they are the people who have an innate capacity for politics. Though all theory moves through the discovery of identities, it can proceed nowhere from verbal identities which are built in from the start.

* * *

"Man is made of cooperation. . . . Every man is born helpless and wild. He wins control of himself through the education given by the group. . . . The individual is born of the group. . . . Man owes to the group his moral and material condition." [22] From this standpoint De Jouvenel mounts a well worked out attack on those parts of liberal contract theory which finds groups put into motion autonomously through situational pressures which issue in contracts of society. This is accomplished through the telling of a refreshingly "primitive" allegory along the lines of the liberal origin myth purporting to prove that all politics comes with groups already formed and concluding that it is apolitical to start a political analysis from Robinson Crusoe foundations. These passages of the book are very useful. Apparently he wishes them to disprove both situational and individualistic foundations. However, the conclusion of the analysis bears only on the latter. Indeed, by discrediting foolish individualist foundation myths he implicitly supports situational foundations.

Nor is this corrected by the substitution of his own equally foolish foundation myth: "Several promoters make incessant approaches to potential participants. . . . The process of formation gets into gear through the initiative of a single man,

14. *Id.* at 47.
15. *Id.* at 77.
16. *Id.* at 72.
17. *Id.* at 77.
18. *Id.* at 87.
19. *Id.* at 115.
20. *Id.* at 71.
21. *Id.* at 87.
22. *Id.* at 26.

who sows among others the seed of his purpose; some of them, in whom it rises, turn into a small group of apostles for the scheme. . . . At length the association comes into being, not by a mere coincidence of wishes, but as the fruit of one man working on another. The mistake of the classical theory is to overlook the role of the founder — the auctor — in the formation of the group." [23]

This is still a charismatic theory of politics, fitting with the previous assumptions. That is, it is still individualistic. Everything depends upon the galvanizing ability of a leader. Either this is just as "primitive" and prepolitical as the primitive situational theory of liberalism, or the prior society presumed by charismatic leaders such as Hitler or De Gaulle is absent. It is, in effect, a conquest theory of politics, as are all authoritarian theories of politics. "By authority I mean the faculty of gaining another man's assent. . . . The efficient cause of voluntary associations. In any voluntary association that comes to my notice I see the work of a force: that force is authority." [24] More transparent circularity is hard to imagine.

The trouble is that politics involves extraindividual elements. This was stated in the opening criticism of liberal theory. Any individualistically based genetic analysis of politics is doomed because it is impossible to "see" politics before it exists, just as you cannot "see" implicit in the prior elements any new compound substance which their mixture will produce. An attempt is made to escape from this impasse through reference to a principle of creativity existing apart from men. This creative principle is seen in the creator of a family. It is given validity by the way in which it links with a pre-existing chain of authority established by the "Creator of the universe." [25] The principle of harmony, authority, and organization is not really human or political after all. It is divine. It was inaugurated by God. This was always implicit in the charismatic foundations already announced. And though it may be true, there is no way of establishing the fact empirically or theoretically, and there is no analytical benefit to be gained from making the assumption. "The ascendency of a settled will. . . summons and orients uncertain wills. Man is, under Providence, apt to receive the impulsions of other men. . . . The impulsive power never ceases its work of mobilizing human energies. To it we owe every advance we make; it may fairly be called providential.[26]. . . What makes leaders, now as always, is natural ascendency — authority as such." [27] Even if we assume this to be true, it would deprive us of the ability to analyze politics except intuitively or through a revelatory gift of God. Politics comes from a mystical providential leader possessed of charisma whose potentiality for political success rests in an emotional predisposition inherent in other men. Politics is authoritarian, spiritual and providential. "What men today banish from their beliefs was naively accepted by them in the past: that certain leaders are chosen of heaven. This feature of the leader, if he has it, is the simplest explanation of the benefits of life in society; and it is a most salutary one as well.

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23. *Id.* at 28.
24. *Id.* at 29.
25. *Id.* at 30.
26. *Id.* at 30-1.
27. *Id.* at 32.

For in buttressing the authority which is the binding force it strengthens the social tie and makes cooperation smoother and more fruitful." [28]

From this point De Jouvenel proceeds to a discussion of the characteristics of "dux" and "rex." To do this he relies on anthropolitical, mythical, and distant historical episodes. He does so, however, not as an analyst, but as an advocate. He assumes that in such material there is direct analogical significance and then seeks the wisdom hidden in them rather than analyzing their functional meanings. For example, after discussing some biblical anecdotes he concludes: "Reflection on the various episodes which center on Bathsheba makes us inevitably ask whether their lesson is not that violence and defilement are natural to the enterprise of founding worldly dominion." [29] The analyst does not ask what is going on concretely in a myth, or what hidden wisdom it expresses: this would be to assume the answer in the question. Rather, he asks, Why did this people develop such a myth? how did it fit with their other forms and needs?

De Jouvenel now seemingly begins to realize the difficulties piled up in the foregoing sections, for the discussion shifts to a new and more fruitful approach: group theory. This is one of the best sections of the book. In making it so he reverses the earlier assumptions: "To consider groups as secondary phenomena resulting from a synthesis of individuals is a wrong approach; they should be regarded as primary phenomena of human existence.[30] . . . The man who has dedicated himself to the success of the project. . . no longer has any freedom: his conduct is now determined altogether by the constraining force of the end. . . . It is the project which is in command." [31] Discussions of stability, innovation, and circulation follow Moscan assumptions and are in general sound.

* * *

Parts II and III deal with the "political good," justice, and sovereignty. Through reference to the earlier facultative theories of political leadership the discussion of authority is converted into a discussion of will. On this basis the traditional liberal paradox of sovereignty under law and the rule of law is analyzed. The argument is involved and aphoristic, incorporating a number of very interesting historical interpretations. I have found the device of numbered paragraphs useful in summarizing it:

1. Is the sovereign bound by law? Austinian jurisprudence says *yes*: the sovereign makes law and is bound by it. But this creates the paradox of sovereignty under law. For this and other reasons the liberal approach to law is meaningless. Liberal theory creates the situation whereby the sovereign is able to change the law and is therefore "absolute" because the sovereign is by definition freed from the laws. This means that the Austinian sovereign is more "absolute" than the traditional (*ancien regime*) sovereign who always acknowledged a moral obligation to obey the laws. The conclusion drawn here is that "the movement in time toward a sovereignty with unrestricted legislative power has been a move-

28. *Id.* at 38.
29. *Id.* at 50.
30. *Id.* at 56.
31. *Id.* at 66.

ment toward absolutism, and the period which we call the absolutist period was in fact only that of the gestation of absolutism. . . . The modern absolutism, which we find the most natural thing in the world, would have been quite beyond the dreams of the most absolute of kings." [32] It makes no difference whether the sovereign is regarded as a person or an institution: the resulting will may still be judged "more or less good"; and the less his will is bounded by an external framework, the more absolute and the more arbitrary it is. Thus the formal institutional approach to constitutionalism is abandoned in favor of a substantive ethical approach. This requires elucidation of substantive political good and justice.

2. Democracy does not solve the problem of good rule. This requires a ruler who is a "rectifier" redressing the scales of justice when they are unbalanced. This raises the problem of how to recover the ancient rectifying function under contemporary conditions.

3. The proper approach is to assume that "the sovereign Will must tend to the public good";[33] it must know good and will to do it.

4. We know from Rousseau that such will can form only in the mind inspired with a feeling for the whole to the exclusion of all else. But as this is unlikely and runs against fundamental human predispositions to selfishness, there must occur a transformation in the sovereign — a conversion in which he loses his personal aspects and becomes identified with the collective "ego" or "we."

5. But no individual can be trusted to make this conversion, and thus political power cannot be trusted in any personal hands. Moreover, the Madisonian solution is worse than placing despotism in the hands of one. "There is no remedy in the form of government for the evil caused by the instinct for despotism." [34] However, coronation ceremonies of ancient sovereigns were transformations involving death and rebirth containing a political truth. This and the royal environment tended to buttress the depersonalized conversion and spiritual change in the crowned sovereign.

6. But there are two sovereign functions: the converted king who wills the good (*rex*), and the executor who is able to get it done (*dux*). These can never be in the same hands.

7. Is the common good self-evident? Politics would be simple if it were; but politics would also be despotic, leading to the Robespierre type of despot suppressing any disagreement.

8. Is the common good subjective? If we assume that it is, then within each subjective interpretation there would lie a "common substance" because it may be assumed that all subjective desires for the common good aim toward something common. From this it follows that "the duty of rulers is exclusively to individuals." [35] It achieves the good of the social whole only as that good is comprised in the personal good of each of the individuals who compose it. No ruler could compose the differences between particular goods if they were all selfish,

32. *Id.* at 90.
33. *Id.* at 92.
34. *Id.* at 95.
35. *Id.* at 109.

but when they are all desires for the common good it is easy to compose their differences. Moreover, no authority could know each man's true individual good better than he himself could know it; only God would be capable of this. Thus "it is impossible for the ruler to consider individual goods particularly: he can only conceive of them in general terms." [36]

9. But the ruler stigmatizing all action but the good would be detestable, always persecuting the nonconformist. Thus it is equally bad for authority to try to procure the goods of individuals or for individuals to try to. "It is not the office of the public authority to procure the personal goods of individuals." [37]

10. It appears that the social good consists, at least in part, in the social tie itself. In upholding this the sovereign cannot go so far as to subvert the individual's mastery over his own actions. What he can uphold, however, is the institutionalization of trust; for without this, society could not exist at all, uncertainty being the great principle of disassociation. But only through religion can this be maintained in such a way as to support the general notion of trust and obligation while reserving the autonomy of individual wills. At least, this is so of the Christian religion, and that is why Christian societies have been "progressive" as distinguished from religions which have institutionalized concrete codes. Thus, K. R. Popper is right in arguing that all utopian or ideal social states are wrong and implicitly totalitarian in the same sense as are religions which institutionalize concrete codes. Utopianism is a heresy.

11. Justice must tend in the same direction. Thus it cannot be an arrangement of concrete things. This would be the utopian heresy. In any case, it is impossible for men to devise a just arrangement of concrete things in problems such as the allocation of valuables. "Justice is a quality, not of social arrangements, but of the human will." [38]

12. It was previously argued that the liberal depersonalization of sovereignty was evil and absolutist. "The traditional view of the king was, in effect, that of a will at the service of justice." [39] This view, moreover, fits well with justice as described above. The justice of a personal ruler need not be regarded as absolutist. Individual freedom is just as consistent with it as free will is consistent with the sovereignty of God. Leibnitz proved this in arguing that a thing is reasonable not because God wills it, but rather God wills it because it is reasonable. The political problem then is to get rulers who will things because they are reasonable (just). "It is this ideal will which is sovereign." [40] And because of this there can be "no bounds or limits to obedience." [41]

13. The institution of a just sovereign will is admittedly difficult to achieve in practice, but recalling the *ancien regime* it appears that certain forms were instituted to see that insofar as possible the royal will lived up to this ideal. Some of these forms ultimately became liberal constitutional forms of state machinery. However, these must not be regarded as checks on the ruler, but rather as organs

36. *Id.* at 112.
37. *Ibid.*
38. *Id.* at 165.
39. *Id.* at 194.
40. *Id.* at 207.
41. *Ibid.*

through which he wills what is just. "The sovereign will is absolute, but . . . every precaution, moral and material, has been taken to ensure that this will coincides with reason. . . . There are natural laws which can be known by reason and it is the royal duty to apply them." [42]

* * *

These thirteen points embody the reasoning in Parts II and III of *Sovereignty* and presumably comprise what De Jouvenel regards as the heart of his message. Even so, the above summary falls far short of doing justice to that discussion, for throughout are numerous passages showing ingenuity and brilliance which are up to the best standards of political writing available. These sections should be read and pondered for those virtues. Moreover, it can be seen that the ideological result of the argument is to defend the amalgamation of two elements traditionally regarded as incompatible: economic individualism and political authoritarianism. Justice is prohibited from encroaching on economic realms in something like the way Lippmann would limit politics, but the political authority which remains is royalized and absolutized. From the standpoint of practical mid-twentieth century Western politics, therefore, it would seem to be a very useful ideological contribution. It furnishes a direct rationale for the De Gaulle constitution as well as for the constitutional trend in America over the past decade. The book should retain its currency at least so long as these constitutional trends prosper. In this sense it is deserving of comparison with the writings of Locke. This is by no means a criticism. To be worth the name, political theory must direct itself to the solution of real problems.

The intrinsic merit of the analysis of justice is quite another thing. The argument concluding in favor of traditional over modern absolutism rests on the identification of Austinian sovereignty with "an unchecked and unbounded sovereignty of a human will." [43] But this is just the opposite of Austinian legal theory, which dealt with legal as opposed to personalized sovereignty. It was absolute only in the sense that a law in theory applies with generality to all equally. Austinian theory was absolutist only to the extent that any such regulation in any type of society is absolute. If there were any laws of general applicability in De Jouvenel's imagined regal order, these laws would be "absolute" in theory. De Jouvenel does not avoid the problems of legal theory by avoiding their theorists.

In eulogizing the *ancien regime* a different error is made. It is assumed that because kings claimed to rule according to natural law this was in fact the case and could again be the case. This amounts to the historical reification of the royal ideology. The problem of the rule of law is avoided by assuming the practical possibility of the rule of morality. Basically, what is offered is a theocratic solution, and this is true of each section of the book.

Even if there were no problems here, further ones are incurred by placing all authority (except in allocational matters) in the hands of an ethical ruler. For he is given the task of resolving noneconomic individual conflicts. It is as-

42. *Id.* at 209-10.
43. *Id.* at 199.

sumed he will be able to do this through an ability and a desire to perceive the common good underlying individual desires. That is to say, except for economic matters, individuals do not participate in the resolution of their apparent conflicts. Thus they have no real basis for knowing that the royal resolution is truly just and really an expression of their inner wills. Consent is missing. It must be; otherwise, contract theory would re-enter.

It is for this reason that the obligation to obedience had to be made absolute. Having failed to deal with conflict resolution in society, he had to make the social tie itself into a generalized obligation. Society for its own sake required obligation for its own sake. This difficulty is evaded, not met, by the suggestion that Christian societies are different. For once again the path out of the difficulty is found by reifying an ethic: by assuming that a society which deemed itself Christian would *ipso facto* realize Christian morality in practice. Had this been true the practical problems of political theory and constitutionalism would have been solved many centuries ago. A grave deficiency of the book is that it is nowhere concerned with constitutionalism. De Jouvenel rests politics on providential rulers observing economic self-restraints and seeking natural principles of justice. His state is a neoclassical theocracy. This is probably not what De Jouvenel intended. However, it is easy to see how this presumably unintended consequence resulted.

The above quotations have shown not only how extensively De Jouvenel has borrowed from St. Thomas but also the maneuvers through which the Thomistic system was given a neoclassical economic revision. However, as it was pointed out earlier, the crucial role St. Thomas gave to formal analysis is lacking in De Jouvenel. This distinguishing feature of Thomistic conceptualism permitted the construction of an imperative political ethic informed by natural law, relevant to empirical political problems but not tied directly to a divine order. In this fashion St. Thomas produced a political ethic which was not theocratic. De Jouvenel, in omitting St. Thomas' distinctive analytical framework, incurred errors his great master avoided.

HARVEY WHEELER

VOM GESETZESSTAAT ZUM RICHTERSTAAT. RECHT ALS MASS DER MACHT. GEDANKEN ÜBER DEN DEMOKRATISCHEN RECHTS– UND SOZIALSTAAT. By René Marcic. Wien: Springer, 1957. Pp. 548. Dm. 48.00.

The work of René Marcic under review contains a political program which is clearly apparent in its title and is further stressed by the jacket description: The Road between Security and Freedom. To indicate this is not to depreciate the author's comprehensive erudition, and it is not to be regarded as a criticism, for certainly politics as a science must be founded on, and as a policy of law must serve the objectives of, truth and justice, yet it is a clue to the author's personal concern. This concern can then be seen as the author's desire, indeed his passion, to contribute to the realization of a legal order warranting security

and freedom at the same time, and bringing together into a well-balanced relation both of these basic essentials of community life.

If one asks then which factor, according to Marcic's point of view, would seem to provide a balance, the answer is to be found in a "third power" and therefore in an independent judiciary. But Europe's special situation requires proof that judicial independence can exist only when it finds its ultimate source in the law and not in mere legal opinions (statutes). The Third Reich and the Soviet State furnish ample evidence that a merely statutory state which poses as a law state can maliciously lead to a full subjugation of the judiciary, when, that is to say, positive statutes (statutory law) are set up as equal with the law (justice).

Thus the author achieves an extensive probing of law in which there is a contribution to legal ontology. Legal positivism alone — which in Europe always showed a tendency to bureaucratize the "third power" and thus to make it subservient to the executive will of the state — is shown to be lacking in moral principles.

In support, the author cites concrete examples of cases in Austria and in the German Republic where natural law, or in a broader sense something more than positivistic legal thinking, has presently won out within the administration of law itself. Generally there is a resultant development which can be indicated as a tendency, after the superseding of principles of mere legality, towards a substantial rule of law (*materialer Rechtsstaat*).

Not only a scholar but an outstanding journalist, the author has with courage and success repeatedly interceded for the independence of the courts at judicial congresses and especially on the pages of the *Salzburger Nachrichten.* Marcic is able to give a report of success in reviewing a judgment of the Austrian Supreme Constitutional Court (and his conclusion serves also as a supplement to the reviewed work): "Through the strong controlling function given by our Constitution to the Supreme Constitutional Court and through the Court's determination to do its duty, the balance of power is restored in Austria warranting the freedom of the people, and a politically sound division of powers is guaranteed. Parliament is not autocratic; the legislator is also compelled to observe the standards of law. . . . Thus, the Constitutional Court has become a second source of the state power and the first pillar of the citizens' trust. Alongside the Parliament and alongside the government, in legal robes the Constitutional Court exercises the state power for the freedom of the people."

In the last chapter of his work, the author deals with problems of democracy and especially with the aim to attain a real democracy after the merely formal democracy which appears to be threatened in many ways today. Here he also demonstrates a basic tendency to stress the moral power of men, and he calls upon citizens to step out of their indifference, to assert a belief in freedom and an acknowledgment of Europe as a common human destiny.

One must criticize the disturbing number of problems which are touched upon but not developed and answered because of limitations of space. This overabundance gives the book a lexicographic cast, and it is hopefully recommended that in a new edition some material will be cut down and eliminated. This reser-

vation, however, is not meant to detract from pleasure that a book has finally been written whose purpose is to defend man's freedom against the power encroachments of the savage.

ERNST VON HIPPEL

(Translated by JURIJ FEDYNSKYJ)

EDMUND BURKE AND THE NATURAL LAW. By Peter J. Stanlis. Preface by Russell Kirk. Ann Arbor: The University of Michigan Press, 1958. Pp. xiii, 311. $5.75.

As the title of Mr. Stanlis' book implies, its purpose is to demonstrate that Edmund Burke was a natural law theorist, and not, as some of his commentators have stated, the first of the utilitarians or the theorist who "accepted Hume's negations of reason and the law of nature."[1] Unfortunately, what could have been a valuable contribution to our understanding of Burke's thought is marred by a regrettable tone of contentiousness and *parti pris*. Instead of a balanced reassessment of Burke's thought to determine what elements of traditional natural law thinking are contained therein, *Edmund Burke and the Natural Law* is a polemical tract. It seeks to identify all that is evil in the modern world, "Jacobin types of popular collectivism," "impersonal leviathan states," and the "sophisters, economists, and calculators of our century"[2] with a tradition which commences with the Epicureans, continues through modern "natural rights" theorists (under which rubric both Hobbes and Locke are lumped together) to Bentham and the utilitarians and down to "the cannibal state that devours its young."[3] On the other side are the forces of righteousness which are identified as the Stoic and Christian natural law tradition, from Aristotle, through Cicero, St. Thomas, Bracton, the medieval canonists, Hooker, Coke, Blackstone, and ending presumably with Burke.

Now this game of intellectual cops-and-robbers has been played before, and sometimes with different results. For instance, a recent article in *Daedalus*, the publication of the American Academy of Arts and Sciences, has bracketed St. Thomas and Hobbes together as apologists for a natural order of conservatism and absolutism, and distinguished them from the liberal adherents of natural law "running through the Stoics, Spinoza, Locke, and thence to the founders of the American republic."[4] Still another division is used by some of the publications of the Catholic University of America which link Locke and Jefferson to St. Thomas Aquinas by way of Richard Hooker.

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1. GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 607 (New York, 1937). The best known of the interpretations of Burke as a proto-utilitarian is that of C. E. VAUGHAN in volume 2 of STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY BEFORE AND AFTER ROUSSEAU (New York, 1925).
2. PETER STANLIS, EDMUND BURKE AND THE NATURAL LAW 247-249 (Ann Arbor, 1958).
3. *Id.* at 247.
4. Abraham Kaplan, *American Ethics and Public Policy*, DAEDALUS (Spring, 1958) 56.

Stanlis' particular version of the history of political theory is not original with him. He admits his dependence upon two theorists of what has been termed the New Conservative school in America, Russell Kirk and Leo Strauss. Kirk in a series of articles and finally in a book, *The Conservative Mind* (Chicago, 1953), pleads for the reassertion of an American Conservatism based upon Burkean principles which could oppose the forces of liberalism, radicalism, and socialism. "For a century and a half," he laments, "conservatives have yielded ground in a manner which, except for occasionally successful rear-guard actions, must be described as a rout."[5] Ignoring the obvious dependence of American theory and practice upon the principles of the liberal, John Locke, he describes the American Revolution as a "conservative reaction" and even makes Abraham Lincoln a charter member of his Conservative school.

Despite, or perhaps because of, the influence of the principles of John Locke on the Founding Fathers, a case can be made for the essential conservatism of the American Revolution; and Edmund Burke's support of that revolution can be cited to demonstrate that it embodied principles consonant with his views. But the New Conservatives have gone one step further in their effort to find angels and devils in Western intellectual history. They have not only assimilated Burke to the American way of life; they now wish to cast out Locke as a subversive influence. The contemporary scholar responsible for this questionable contribution to the ideology of American conservatism is Leo Strauss. Since Stanlis accepts Strauss without question, and since the single most important defect in his interpretation of Burke is his slavish devotion to the Strauss thesis, it might be in order to say a word or two about it, before discussing the Stanlis book itself.

The classic statement of Strauss' unorthodox view of the history of political theory is contained in his book, *Natural Right and History* (Chicago, 1953), and the distinction between modern and traditional natural law theory which Stanlis uses is drawn from this book. For Strauss, modern and traditional natural law are in essential opposition. The one is objective, pluralistic, and oriented to society; the other is subjective, unitary, and individualistic. The one is based on a rational order of values in the universe, perceptible to man's intellect; the other, on the nominalist denial of reason and exaltation of human will. The one finds its highest expression in the natural law theories of St. Thomas Aquinas; the other, in the natural right of Thomas Hobbes.

Now the distinction between medieval and modern natural law theories has been analyzed by others before Strauss.[6] What marks Strauss' interpretation is that in emphasizing the discontinuity between medieval and modern natural law he rejects the medieval elements of continuity in the classic expression of modern natural law theory, Locke's *Second Treatise on Civil Government.* Where everyone else has noted Locke's concern to refute the theories of Hobbes, and his acknowledged indebtedness to Hooker's restatement of medieval natural law, Strauss sees Locke merely as a clever propagandist who dressed up the theories of Hobbes in a traditionalist disguise in order to deceive a gullible public which

5. Russell Kirk, The Conservative Mind 4 (Chicago, 1953).
6. See, for example, the admirable discussion in A. P. d'Entreves, Natural Law ch. 3 (London, 1951).

had rejected Hobbesianism in its original form. In order to support this argument Strauss is compelled to dismiss all the statements which Locke drew from Hooker as so much window dressing, included by Locke because he was a "cautious man." Strauss seizes upon the hedonism of the *Essay Concerning Human Understanding,* arguing that because Locke's *Essay* expressed a hedonist ethic, and Hobbes had built his *Leviathan* on a hedonist ethic, therefore Locke's *Second Treatise* must have *really* been based on the theories of the *Leviathan* and not on the traditional natural law theories, as had been believed up to the time of Strauss' book. He adds to this an obscure argument that since Locke held that there was no law without sanctions, and since he stated that the sanctions of the natural law were in the afterlife — the existence of which could not be proved by reason — he did not really believe in natural law.

In developing this argument Strauss virtually ignores the vast literature on the interpretation of Locke, although he makes a passing reference in a footnote to *John Locke's Political Philosophy,* by J. W. Gough (Oxford, 1950). Gough based his study on a hitherto unpublished set of essays on the Law of Nature, written by Locke between 1660 and 1664 (a decade after the publication of the *Leviathan*), and containing a most orthodox medieval interpretation of natural law, in which Locke not only used Thomistic argumentation throughout, but even quoted St. Thomas directly. Gough noted that the eleventh essay threw some light on the seeming contradiction between Locke's hedonism in the *Essay* and his natural law theories in the *Second Treatise.* There, Locke specifically denied that utility is the basis of the rightness of action, but held that a right action would also have useful consequences. Gough speculated that this may have been Locke's way of incorporating hedonism into his natural law ethic. As he put it, "Pleasure and pain may be the consequences of, and the means by which we recognize good and bad actions, but they are not the motives of the good man's conduct." (p. 16)

A full and scholarly treatment of this problem was undertaken by W. von Leyden in his extensive introduction to the *Essays on the Law of Nature,* published by Oxford in 1954. According to Von Leyden, Locke always maintained his belief in a traditional natural law theory, and held that his hedonist ethic in the *Essay on Human Understanding* was merely an attempt to describe how men actually come to their knowledge of good and evil (through pleasure and pain), not to determine what is the basis of the moral worth of an action.

Strauss belatedly recognized that the publication of *Essays on the Law of Nature* undercut his thesis that Locke was Hobbes in disguise. In the *American Political Science Review* for June, 1958, he published a complicated analysis of the work, attempting to support his point of view from the *Essays* themselves. This took a bit of straining, but he managed to point out that Locke agreed with Hobbes in rejecting universal consent as a source of natural law (would any traditional natural law theorist hold that it was?) and that Locke, like Hobbes, clearly distinguished between natural law and natural right (ignoring the fact that Locke did so in order to refute Hobbes' view). He also maintained that the *Essays* show that Locke was an empiricist in deriving all knowledge from the senses, while neglecting to inform the reader of the thoroughly Scholastic fashion in which

Locke did so. (*Nihil in intellectu nisi prius in sensu* is a Scholastic, not a Hobbesian, dictum.)

Certainly it is important to emphasize the difference between the theories of Hobbes and those of the classical natural law. As nearly all interpreters of Hobbes have noted, the whole conception of natural law is distorted by Hobbes into a utilitarian calculus of interest. Moreover, Hobbes replaces the pluralistic teleological approach of St. Thomas which sees moral values in purposes implanted by God in nature with a mathematical model based on the single goal of self-preservation. But why force Locke into the Hobbesian mold, and erect an elaborate "conspiracy" theory to do so? The concepts of the state of nature and the social contract which Strauss associates with Hobbes are also found in Richard Hooker's *Laws of Ecclesiastical Polity* in a formulation much closer to that of Locke than is the version put forward in the *Leviathan.*[7]

No one has better stated the difference between Locke and Hobbes than John Plamenatz in the opening pages of *The English Utilitarians* (Oxford, 1949), and yet (and this brings us back to the book under consideration) Stanlis quotes him in support of the Strauss point of view! On page 21, Stanlis quotes Plamenatz as saying, "We need not wonder . . . if we find in the political writings of Locke most of the ideas of Hobbes, except those explicitly rejected by the younger philosopher." Stanlis does *not* quote Plamenatz's next sentence, which reads, "But this does not mean that the systems of Hobbes and Locke are not profoundly different." Again on page 26 (this time without a footnote), Stanlis says, "As Plamenatz observed, it would 'have been as easy to prove that the spiritual ancestor of Bentham was Locke rather than Hobbes.' " What did Plamenatz actually say? The sentence which Stanlis excerpts is not a declarative statement but a question, "Would it not have been as easy to prove that the spiritual ancestor of Bentham was Locke rather than Hobbes?" And Plamenatz goes on to answer the question *in the negative,* concluding, "it is to Hobbes rather than to Locke that the utilitarians are indebted."[8] Now this, I submit, is not just careless scholarship. It is deliberate distortion of the truth in order to fit a partisan point of view.

If the uncritical acceptance and development of Strauss' views indicates a complete lack of acquaintance with the available literature on Locke and Hobbes, the general survey of the history of natural law doctrine with which he opens the book also demonstrates the shallowness of Stanlis' knowledge of other political theorists. Thus he speaks of Aristotle as a natural law theorist and even excerpts a bit of Aristotle's *Ethics* and *Rhetoric,* but omits the very serious qualifications that Aristotle introduces. (The passages in the *Rhetoric,* for example, are simply a recommendation to the Athenian lawyer to argue natural law if positive law was against him.)

Then our tour through history stops at Bracton, whom Stanlis describes as an exponent of natural law, although "he seems not to have read his contemporary, St. Thomas Aquinas."[9] Stanlis himself seems not to have read Bracton, since the

7. Richard Hooker, Laws of Ecclesiastical Polity, bk. I, chap. 10, no. 4.
8. John Plamenatz, The English Utilitarians 19 and *id.* at 21 (Oxford, 1949).
9. Peter Stanlis, *op. cit. supra,* note 2 at 10.

medieval English jurist never mentions natural law, and it would be difficult for Bracton to have read St. Thomas' treatment of the subject, since it was written several years after his death. On St. Thomas himself, Stanlis holds that he believed that "legislation ought to be for and by the people," whereas Aquinas only said that law should be made by the "one who has the care of the community."[10] While Grotius may have been "the first modern to say that natural law would be valid even if God did not exist,"[11] much the same thing had already been said by a number of writers in the scholastic tradition (e.g., Vasquez and Suarez). Moreover, it is not true that "the chief question in every problem of sovereignty is — what makes an act or law just or unjust?"[12] It is, rather, who has "the supreme and unlimited power (or perhaps better, 'authority' — *potestas*) to give laws to the citizenry." (Bodin) All of these are misstatements which indicate that Stanlis does not understand political theory and has not consulted the original or secondary sources, but relies exclusively on the arbitrary divisions of Strauss into which he tries to fit Burke's thought.

Even when he finally moves to a discussion of Burke, the war on Locke goes on. He is called a variety of names, none of them defined, but all presumed to be derogatory in implication. Locke is a "mechanist," a "voluntarist";[13] he is accused of "Augustinianism"; and his natural right theories are called a "disguised form of power or will."[14] On a single page he is accused of "making the social contract revocable at will" and of having "championed the absolute and arbitrary will of parliament."[15]

Now in these accusations, there is some truth and much confusion. Locke did believe that God's will was the source of obligation of the natural law, but so did Suarez. Locke did speak of the right of self-preservation as a natural right (making him sound superficially like Hobbes), but so did Aquinas. Locke did talk about a right to overthrow an unjust government, but so did many medieval thinkers.[16] The very complicated question of the relationship of Locke to earlier theorists is not answered by name-calling.[17]

When Stanlis ceases denouncing Locke long enough to talk about Burke, he analyzes Burke's background and education for the light they may throw on his political thought. Burke was a lawyer, and he had studied Cicero, Coke, and Blackstone, and derived from them a belief in eternal and unchanging principles of natural justice. This much seems clear. Moreover, he seems even to have gone

10. St. Thomas Aquinas, Summa Theologiae I-II, qu. 90, art. 4. See also I-II, qu. 105, on the role of the people in government.
11. Peter Stanlis, *op. cit. supra,* note 2 at 23.
12. *Id.* at 233.
13. *Id.* at 137.
14. *Id.* at 138.
15. *Id.* at 23.
16. See, for example, St. Thomas Aquinas, Summa Theologiae II-II, qu. 42, art. 2. In his commentary on the sentences, Dist. 44, qu. 2, art. 2, resp. ad obj. 5, St. Thomas even defends tyrannicide.
17. E.g., "the inept compromises of Locke" (p. 26); "the cynical Hobbist theory" (p. 181); and the frequent use of the term "nonsense" for the views with which the author disagrees. Cf. pp. 172, 181, etc.

further and accepted the basic Lockean principles that (as Stanlis quotes him on pages 43 and 48) "a conservation and secure enjoyment of our natural rights is the great and ultimate purpose of civil society. . . . When tyranny is extreme and abuses of government intolerable, men resort to the rights of nature to shake it off." Otherwise it would be difficult to explain his support of the American Revolution, which — conservative as its character may have been — was based on the principles of John Locke.

Yet, as Stanlis admits, Burke's appeals to natural law and to natural rights were much less frequent and important in his thought than his appeals to the British Constitution, to which the colonists also appealed. It is not enough to say, with Stanlis, that these appeals to the British Constitution were "indirect" appeals to natural law. The logic of this type of argument is most clearly faulty when he tries to prove that Burke's attack on the natural rights theories of the French revolutionists was really a defense of the natural law. "As the English constitution was itself based upon the traditional natural law, Burke's attack on the false claims of revolutionary 'natural rights' was direct defense of the prescriptive English constitution and an indirect defense of the traditional natural law." Why all this twisted logic? Why not just say that Burke believed in the British Constitution and in the moral principles which were embodied in it, and he thought that the French natural right theorists were subverting both these principles and their application?

Burke appealed primarily to tradition and the British Constitution. If he also believed in eternal moral principles applied in different ways in different circumstances, this does not make him "a Thomist in political philosophy."[18] Nor does the fact that he felt that "it was perfectly *natural* for revolted subjects to form an alliance"[19] with France make him an adherent of the natural law school. While he believed in fundamental principles of justice, natural law, in the Thomistic sense of a set of teleological goals in man's nature, does not seem to have been an important concept in Burke's political theory, except in the early "Tract on the Popery Laws." The only real similarity between Burke's thought and that of St. Thomas is a certain reluctance to spell out the exact content of fundamental law and an awareness of its changing content in various circumstances. However, I doubt if this would be enough to make a political theorist into a Thomist. If it were, Thomism would have many more adherents.

A similar tendency to find a nonexistent Thomism in Burke appears in Stanlis' discussion of Burke's use of "the principle of prudence," as opposed to the "utilitarian precept for survival in the jungle of nature." Stanlis distinguishes between Burke's frequent appeals to the principle of utility from the moral principle of the utilitarians by stating that "to Burke a law or action was not good because it was useful, but utility was merely one of several positive social consequences of morality." Later, "moral prudence" is described as "Burke's own unique addition"[20] to the natural law tradition. Now the belief that natural law has its own

18. PETER STANLIS, *op. cit. supra,* note 2 at 249.
19. *Id.* at 90. (Italics supplied.)
20. *Id.* at 122-123.

built-in sanctions was already a commonplace of Scholastic thought. From the time of Plato and Aristotle, the just man was believed to be the only truly happy one. That, at least in the long run, crime does not pay and honesty is the best policy, is taught by nearly every moralist. What the utilitarians did was to turn from the a priori standard in nature to the a posteriori consequences of any given action, and say that the real basis of the moral worth of an action lay in its consequences, narrowly defined as pleasure and pain, and not in any principles derived from or rooted in man's nature. While one cannot label Burke as a utilitarian, he shared with the utilitarians a very considerable concern for the social and practical consequences of action in opposition to the abstractions of the natural law (or, to use Stanlis' terminology, "natural rights") theorists of his day, and thus he prepared the way for the adoption of the principle of utility as a moral and political standard. Stanlis has not proved, at least to my satisfaction, that Burke's emphasis on expediency was in any way consciously related to a Thomistic theory of prudence in the application of moral principle. In the two quotations given by Stanlis[21] in which the word "prudence" is used, it means nothing more than restraint in proposing reforms for fear that they will be carried to extremes. Burke seems to have believed that there were eternal moral principles (although he never became very specific about what they were), and Stanlis quite rightly brings this out; but Burke also seems to have held that the important consideration, at least in political decision-making, was the social consequence of a given action, and this was not rationalized in any Thomistic fashion as the "moral principle of prudence."

More than any theoretical system, it is his general belief in moderation and his respect for traditional and institutional forms which distinguish Burke from the utilitarians. This fundamental conservatism also links him to Locke, to whom Stanlis attempts to set him up in opposition. Of course, there are very important differences between the two thinkers, and Stanlis brings out some of them. Locke constructed his theory on the basis of a real or assumed state of nature and social contract. Burke rejected the state of nature and put forward a mystical conception of the social contract which was altogether different from that of Locke. Locke's great emphasis was on the individual and his rights, while Burke looked toward society and its history and experience. Locke, like the Scholastics, believed in a rationally perceived natural law; Burke, in certain fundamental moral truths which were felt with the emotions as much as perceived with the intelligence.

Yet both were conservatives; both stood for the same things in British politics. Both defended the settlement of 1688, and both felt that in extreme cases one could resort to revolution to defend the established order. Moreover, both held that the best constitution for England was the mixed form in which elements of democracy, aristocracy, and monarchy were combined. While to uphold these principles in 1790 meant something different from doing so a century earlier, Locke would probably have been just as shocked as was Burke at the excesses of the French Revolution and the demands of the utilitarian reformers for annual parliaments and universal suffrage.

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21. *Id.* at 116-117.

The fact that Burke looked first to society rather than to the individual in his political writings demonstrates another defect in the analysis by Stanlis. He endeavors to prove that the tradition deriving from Locke and the utilitarians leads to collectivism, while Burke and the classical and scholastic natural law school constitute a bulwark against it. Now one can certainly find collectivist elements in some of the writings of Bentham; and if one accepts the analysis of Willmoore Kendall,[22] perhaps they can also be found in Locke. Yet surely the emphasis in Locke's writings is on the safeguard and protection of the individual, and the emphasis in Burke's writings is on the importance of the community.

One can say that Locke's theory is, in its general outlines, a theory of individualism, and Burke contains more collectivist elements, but it is much less helpful to link the one to a school of "natural rights"-cum-utilitarians and attribute to it all the evils of the present-day world, and to assimilate the other to a natural law school which is the source of all that is good. Natural law can be used in a variety of ways. It is a method of thinking about morals, law, and politics, rather than a body of substantive propositions. The distinction on which it is based, between what is natural and what is not natural ("conventional," "artificial" — Stanlis in excessively heavy reliance on a Chicago Ph.D. thesis calls it the "antithesis of nature and art") contains implications for reform or even revolution. On the other hand, a transient and even unjust feature of contemporary society can be linked to the natural law, and thus placed above change, criticism, or improvement. Thus, on the basis of differences perceived in the nature of man, Aristotle said that slavery was naturally just. On the basis of similarities in man's rational nature, Locke and Jefferson and Jacques Maritain have said that all men are by nature equal. In both cases the argument is couched in terms of natural law, rational a priori principles which can be perceived by man.

The same thing is true of utilitarianism. On the basis of utility, the greatest good of the greatest number, Bentham advocated prison reform and universal suffrage. On the same basis, he had earlier advocated authoritarian government. Both natural law and utility can justify both revolution and reaction, and it is both illogical and unhistorical to oppose the two methods as absolutely as Stanlis has done, and then to place Locke in the utilitarian camp (although, as noted before, there is more justification for doing so with Hobbes).

To take a contemporary example, perhaps the most important domestic problem in contemporary America is that of desegregation. Some Southern apologists will use natural law arguments and maintain that Negroes are naturally inferior to whites and, therefore, should be educated in separate schools. Their integrationist opponents appeal to the natural law principles of equality enshrined in the Declaration of Independence, and assert that Negroes are entitled to equal treatment by the government and protection against discrimination on the basis of race. A segregationist might appeal to utility and say that the only way to prevent violence is to keep the schools separate, while an integrationist might

22. Willmoore Kendall, John Locke and the Doctrine of Majority Rule (Urbana, 1941).

appeal to the adverse effect of segregation on the American position in world public opinion. A Burkean appeal to the historical folkways of the South could be counterbalanced by reference to the American tradition of equality, or to Burke's own belief in fundamental moral principle. The method of argument does not lead inevitably to one conclusion or the other, although — as a matter of historical record — the utilitarians are more closely linked with reform movements, and the natural law theorists (on the whole, and with important exceptions) with justification of the *status quo*. Natural law, however, was used by Locke, Jefferson, and Paine to justify revolution; and if Stanlis is opposed to revolution (or to some revolutions and not to others, since presumably he approves of the American Revolution), let him say so, rather than attack those he dislikes as applications of "natural rights" and praise those of which he approves as embodying the principles of natural law.

What I object to in this book is the uncritical acceptance of a partisan attitude toward the history of political thought, and its application to Burke in a way which distorts his point of view and that of many others. Burke was not a prophet for contemporary America. We would not accept his defense of entrenched privilege, his belief in the virtue of "rotten boroughs" in parliament, and his opposition to universal suffrage. We would not accept his attempts to justify a society rigidly divided into social classes, and I would very seriously disagree with Stanlis' statement that "the Christian concept of equality" implies a Burkean "hierarchy of values *and classes*."[23] On the other hand, many of us would share Burke's belief in fundamental and unchanging moral principles combined with moderation and flexibility in their application to concrete circumstances. I wish that Stanlis had restricted himself to examining this aspect of Burke's theory; i.e., the relation of morals and politics, instead of engaging in polemics.

If the contentious and intemperate language of this book is overlooked, there is much in it from which the student of Burke can profit. The picture which emerges of a great Anglo-Irish statesman who combines the best qualities of the moralist and the politician is a very attractive one. A true Christian humanist, Burke has furnished a model for British conservatism ever since his day. Whether he can have the same appeal for Americans brought up in the tradition of Locke and Jefferson, will depend to a considerable extent on whether we feel the need of a historical model for the conservative attitude which seems to have been forced upon us by the exigencies of the world power struggle, our own increasing prosperity, and our inability to elaborate a new and dynamic theory which can capture the imaginations of America and the world.

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23. PETER STANLIS, *op. cit. supra*, note 2 at 191.

STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY. By Jerome Hall. New York: Oceana Publications, Inc., 1958. Pp. vi, 300. $6.00.

"It was said of Socrates, that he brought philosophy down from heaven, to inhabit among men; and I shall be ambitious to have it said of me, that I have brought philosophy out of closets and libraries, schools and colleges, to dwell in clubs and assemblies, at tea tables, and in coffee houses." These confident remarks of Joseph Addison in the March 12, 1711, issue of *The Spectator* could not but please his avid readers. For the philosopher is constantly being challenged to show the relevance of his thought to contemporary problems. And while it is well to caution against expecting spectacular results, it would surely be amiss for him to regard this challenge as an affront, or worse, as beside the point.

Nor is the legal philosopher spared this insistence. What relation, he is asked, is there between your thinking and what goes on in the courtroom or the legislative assembly? Professor Jerome Hall is not one to back away from this question, and his efforts have been fruitful.

This book is a collection of pieces covering a wide variety of subjects, but all bear Hall's distinctive stamp and consider important jurisprudential problems of our time. Of the fifteen, twelve have appeared before;[1] and three are new.[2]

Of the new contributions, perhaps the most noteworthy is the chapter entitled "Causation." In this the author explores the meaning of "causal relationship" between legally proscribed harms and conduct, giving particular attention to problems in criminal law.

Initially, he distinguishes "mechanical or physical causation" (*sine qua non*) from a principle of causation which is relevant to legal liability. Quoting from a New York case, he notes that the object of legal inquiry is not some cause "in general" but "some cause for which the defendant is responsible."[3] He continues: "From a wider perspective the cause of any given event is the sum of all the necessary conditions of that event; i.e., conditions are in no way distinguishable from causes."[4] Hence, "causation" in law involves an evaluation,

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1. *Integrative Jurisprudence,* as revised from INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 313 (ed. Sayre, 1947); *Plato's Legal Philosophy,* 31 INDIANA LAW JOURNAL 171 (1956); *Unification of Political and Legal Theory,* 69 POLITICAL SCIENCE QUARTERLY 15 (1954); *Authority,* reprinted from first ANNUAL PROCEEDINGS OF AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY (1958); *American Tendencies in Legal Philosophy and the Definition of "Law,"* 3 COMPARATIVE LAW REVIEW OF JAPAN (1956); *The Progress of American Jurisprudence, 1906-1956,* from THE ADMINISTRATION OF JUSTICE IN RETROSPECT 24 (Harding ed., 1957); *Legal Classification,* 5 JOURNAL OF LEGAL EDUCATION 329 (1953); *Crime as Social Reality,* 217 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1 (1941); *Federal Criminal Procedure,* 51 YALE LAW JOURNAL 723 (1942); *Science and Reform in Criminal Law,* 100 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 787 (1952); *Revision of Criminal Law—Objectives and Methods,* 33 NEBRASKA LAW REVIEW 3 (1954); *Psychiatry and Criminal Responsibility,* 65 YALE LAW JOURNAL 761 (1956).

2. *Legal Theory and Jurisprudence; Culture, Comparative Law and Jurisprudence; Causation.*

3. Laidlaw v. Sage, 52 N.E. 679, 689 (N. Y. 1899).

4. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 160 (1958).

an ascribing to an event the "cause." That is, it must be decided what *ought* to be denominated the "cause."

Against this background Hall examines several criminal law situations in which there has been a tendency by the courts to downgrade *mens rea* under the guise of applying a "principle of causation." For example, in *State v. Frazier*,[5] the Supreme Court of Missouri upheld the manslaughter conviction of a defendant who struck the deceased a blow which would not have been fatal but for the fact that the latter was a hemophiliac. The court approved the following standard text quotation: "It is immaterial that defendant did not know that the deceased was in a feeble condition which facilitated the killing, or that he did not reasonably anticipate that his act would cause death."[6] Hall directs his fire against those opinions which pass over knowledge of the risk of harm because of an apparent belief that "substantial physical causation" is determinative. In his view, "[t]he temptation to exclude *mens rea* from problems of causation arises from overconcentration on mechanical causation. This encourages the view that causation is not a legal problem . . ." [7]

Going further, Hall undertakes to show that even the factual inquiries are defined and, to a considerable degree, determined by policy. "[W]hile policy alone does not distinguish causes from conditions, and although a factual process is included in the determination of that question, nevertheless, policy demarks the limits of relevant factual inquiry and participates in the definition of causes."[8]

Hall's ideas emphasize the normative character of judicial inquiry and adjudication. If more widely adopted by the courts, this emphasis would result in more intelligible (and I believe, intelligent) statements regarding the difficult problems presented. For courts would then have to bring into the open more of those factors determinative of their decisions. Responsibility could not be evaded for choices made on the ground that only one possible choice was open and that simply a question of fact.

"Psychiatry has much to contribute to law; but it also has many limitations which lawyers and judges do not appreciate. Moreover, because Anglo-American criminal law embodies and safeguards important values, it ought to be obvious that not all the discoveries of psychiatry are grounds for modification of the criminal law."[9] Thus does Hall introduce a timely chapter on "Psychiatry and Criminal Responsibility."

If, as some believe, a serious dialogue is emerging between medical and legal representatives respecting criminal insanity, a share of the credit must surely go to Hall. His approach has been rigorous, but not unbending. While anxious to learn from the psychiatrist, he has demanded that the latter consider certain recognized legal values. For example, he affirms the necessity for criminal law, as a normative science, to postulate a degree of autonomy for the individual. Regarding punishment as a corollary of man's responsibility, he states: "To take no punitive measure against normal persons who voluntarily harm others would

5. 339 Mo. 966, 98 S.W. 2d 707 (1936).
6. 29 CORPUS JURIS 1082.
7. HALL, *op. cit. supra*, note 4 at 185.
8. *Id.* at 194.
9. *Id.* at 267.

be the grossest sort of social irresponsibility. . . A dogma that equates normal adults with helpless victims of disease is incompatible with respect for personality and distinctive human traits."[10]

Similarly, Hall cautions that individualization of punishment (or "therapy") must not be permitted to efface the "Western tradition of the sovereignty of law." While favoring a measure of individualization, and indeed offering suggestions as to how it might be accelerated within our present legal framework, he nonetheless warns: "[O]ne cannot have his cake and eat it too. We cannot have the advantages of protection by law and also have all the advantages that in particular instances might flow from completely unfettered discretion in the treatment of criminals."[11]

This rather conservative approach, coupled with a determination to subject new proposals to exacting critiques, is no doubt exasperating to some. But if, for instance, they are annoyed by his championing of the M'Naghten Rules, they must acknowledge that he has buttressed them in a way few thought possible. And it is still true that before we discard what we have, we ought to know precisely what it is. Hall helps us do this, and he does it well.

Hall neither recoils from unfamiliar concepts nor is he satisfied with anything less than painstaking investigation. This leads, it seems to me, to a fundamental attitude on his part which is slow to condemn that which has gone before and does not presume to know fully what exists today. Statements of the following type abound in this book: "In ancient China . . . as long ago as 2500 B.C. there were discussions of criminal negligence which are quite modern in their appraisal of the ethics of criminal responsibility."[12] "As a matter of fact, if we go back as far as the thirteenth century and read Bracton fairly, we may come away with no little admiration for the understanding and moderation of those days regarding the lack of responsibility of mentally diseased persons. The history of ethics and epistemology is ancient and pregnant with ideas current today."[13] "The organic view emphasizes that the present is an emergence from the past, and that to understand the present law we must study it as a development from past institutions, past customs, and past law, recognizing the enduring bonds which unite the entire process."[14]

Therefore, it might come as a surprise to observe flashes of virtually unlimited optimism in the book. On the first page we find the following: "From an appreciation of the principal levels of legal thought [positive law, legal theory and jurisprudence] and of the potential consequence of their compatibility, the road to a verifiable and systematic development of jurisprudence can be clearly discerned."[15] This contrasting attitude is most pronounced in a chapter which he entitles "Integrative Jurisprudence" and in which he undertakes to outline the elements (or perspective) of an "adequate" legal philosophy. After indicting natural law philosophy, American legal realism and legal positivism as "partic-

10. *Id.* at 272.
11. *Id.* at 273.
12. *Id.* at 103.
13. *Id.* at 210.
14. *Id.* at 111.
15. *Id.* at 1.

ularistic" he argues that this "Integrative Jurisprudence" would alone have the requisite "ultimacy," "comprehensiveness," and "consistency." He advances as the "central insight" the statement that "the juridical object of knowledge is the legal philosopher's experience in relation to the application of organized force by reference to certain situations concerning public interests, in accordance with prescribed norms that represent defensible value-judgments."[16] Emphasizing a concept of "law-process," he maintains that for one to understand judicial and legislative process it is necessary that he participate, at least vicariously, in the problem-solving activity of the law. He puts it this way: "[N]o philosophical account, however suggestive, can be as illuminating as the knowledge that is experienced in actual participation in the process of law-making and breaking, litigation and trial, adjudication and enforcement, etc. It is not unlikely that the actual participation gives rise to a knowledge that is not entirely conceptual — a knowledge that may be uniquely derived in action."[17]

The foregoing does not, of course, purport to be a complete statement of Hall's "Integrative Jurisprudence," nor, I take it, does he suggest that any such elaboration is contained in this book. However, until further statement appears, I cannot escape the notion that he overestimates its significance. Is it merely another methodology? Or even perhaps an old one under a new label? One would be foolish to discount altogether the advantage of the type of engagement Hall recommends, but will this insure the success he envisions? Possibly the difficulty for me lies in what I regard as the limited nature of the philosophical inquiry itself, a limitation which militates against such great expectations.

To conclude, it might be well to comment regarding a suggestion of Hall's that the use of the term "natural law" be discontinued. Indeed, as if wearied of all the semantic in-fighting and breakdowns in communication, he cites this as an "obvious need."[18] But is it? It is necessary to have a term evoking those things which "natural law" evokes. And in view of its long usage and the rather careful articulation of various natural law theories, it is difficult to foresee any gain from the introduction of a new nomenclature. Our vocabulary is adequate; if there has not been effective, meaningful communication, the reasons must be sought elsewhere. But in this quest, too, so long as there are men like Jerome Hall, there is hope.

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16. *Id.* at 38.
17. *Id.* at 42.
18. *Id.* at 27, n. 9.

THE DEFINITION OF LAW. By H. Kantorowicz. Edited by A. H. Campbell. Cambridge University Press, 1958. Pp. xiv, 113. $3.00.

This small volume was intended as the first part of an introduction to a proposed Oxford History of Legal Science, of which Professor Kantorowicz was the chief designer. His death in 1940 put an end to the project. *The Definition of Law* was edited and otherwise prepared for publication by Professor A. H. Camp-

bell. In an introduction Professor A. L. Goodhart describes the project for the *History* and its abandonment at Kantorowicz's death. In a moving tribute to the dead scholar, Goodhart says, "Whether [the project] can ever be revived in the future is uncertain because it is unlikely that another editor possessed of his encyclopaedic knowledge, wide interests, and unlimited energy can be found." (p. xii)

The Definition of Law was intended, therefore, not as an abstract study in analytical jurisprudence. Its very practical function was to serve as guiding principles for a comprehensive history of the science of law. Kantorowicz meant to put his notions of fundamental legal definition into practice and to test them against the panorama of world legal history. It turns out that his definition of law is narrow, but it is easy to see that if it had not been, then the subject matter could easily have swamped even so comprehensive a mind as Kantorowicz's. Not that these considerations of expediency induced Kantorowicz to limit his conception of legal science. He was and apparently always had been in sympathy with English analytical jurisprudence. But Kantorowicz's definition of law is much broader than that of traditional analytical jurisprudence. He discarded the limitations of "command," of "sanction," and of "sovereignty." He recognized that the social matrix out of which law arises is part of the very definition of law. It would be strange if this were otherwise in a legal historian, especially one writing after half a century of sociological jurisprudence. Still it is undoubtedly an extension of the traditional habit of regarding jurisprudence as strictly an inside job. Nor does Kantorowicz hold himself to the modern institutional forms by which the business of law is done. Again, such a limitation would have been too confining for a historian.

With all this said, however, Kantorowicz is still very much the analytical jurist, and his departures from its tradition are in matters of emphasis, not principle. He defines law as "a body of social rules prescribing external conduct and considered justiciable." (p. 79)

We have said that Kantorowicz expressly rules out of the definition of law, the older analytical notion of command. Legal science, he says, deals not only with commands, but also with precepts and dogmas. For sanction and sovereignty he substitutes the very much broader notion of "prescription." By "social rules" he means to release himself from the limitations of sovereign legislation, and in the notion of "justiciable" he means to include not only the work of courts but also that of all other social institutions prescribing and enforcing rules for external behavior. He does not explicitly include the element of "force" in his definition of law but makes the idea of "prescriptions" do for that as well. It is thus evident that sociological jurisprudence, as well as Kantorowicz's vast knowledge of the history and the present state of the world's great legal systems, has worked on him to broaden the narrow confines of the notion of law as "the command of the sovereign."

In discussing the nature of definition, Kantorowicz warns his readers that he intends to shun "verbal realism," by which he means the taking of the name of a thing for the very thing itself. Definition for him is teleological. Unless one understands what he intends to do with his definitions he cannot define ade-

quately. Terms do not possess meaning independent of the use to which they are put. This does not mean that one can play fast and loose with them. It is to suggest that the test of a definition is its comparative usefulness: ". . .we must choose the most fruitful among several linguistically possible definitions of a term denoting a thing, before we can examine and demonstrate the truth of any (descriptive or analytical) assertion regarding the thing denoted." (p. 9) With quiet dogmatism Kantorowicz announces this as *The* Right Method of definition and calls it Conceptual Pragmatism. By this term he does not mean to be understood as accepting what he calls "propositional pragmatism," that is, "the sophistical, mischievous doctrine tending to identify the truth of any proposition with its usefulness for some practical purpose." (p. 90, note 8)

The style of the book is simple, direct, and forceful. From this point of view it is indeed unfortunate that his proposed History of Legal Science was never written; for if it had been, no reader would be at a loss to understand what the great legal scholar intended to say. The Introduction convinces one that with his simplified notion of what he took legal science to be, and with his incomparable scholarly equipment and personal vigor, Kantorowicz would have made an impressive addition to the world's scant store of learning on the subject of "the science of law."

Nowhere in this Introduction does Kantorowicz indicate that he has consciously chosen only a part of jurisprudence for his study, namely, the history of *legal science.* Are we to suppose that he therefore expressly passed up the philosophy of law, except as this subject touches upon legal science? If so, the proposal would almost amount to a conscious bypassing of the history of the concept of justice. This could not be his intent. And yet if he intended to treat this concept as part of the science of law, he would have to take a stand on the relationship of morality to law. And I suggest that it is fair to suppose that, for him, only positive morality as it enters into the formulation of rules and adjudication of cases involving external conduct would be appropriate to consider in a context of "science of law." To this extent he embraced the Kantian dualism between "is" and "ought" and would labor to focus attention exclusively on morality as it affected legal "existents." In this resolve (if it was his) he would be at one with the logical positivists and the traditional analytical jurists. But again, if so, Kantorowicz's analytical jurisprudence is outmoded, at least as compared with that of H. L. A. Hart, who in his inaugural address[1] as Professor of Jurisprudence at Oxford wrote very differently on the Definition of Law.

The Index of this book lists only three pages in which the term "natural law" is mentioned. The first (p. 13) is merely a passing reference. The second (p. 33) is a historical allusion. In the third (p. 35), Kantorowicz takes a critical stand toward natural law, and that only in its "radical form," in which, he says, the mistake was made of regarding law as nothing but "a body of *precepts,* viz. of justice or morality." It is impossible to suppose that a legal historian could ignore the immense body of legal materials known as "natural law," and it is therefore reasonable to believe that Kantorowicz intended to treat this vast agglomeration

1. 70 LAW QUARTERLY REVIEW 37(1954).

of legal materials as part of the general social matrix out of which arise "social rules prescribing external behavior and considered justiciable." The intent then was to conform the whole corpus of natural law doctrines to the expanded form of analytical jurisprudence which Kantorowicz espoused. It is perhaps just as well that this Procrustean task was never pursued.

It is fair to ask why Kantorowicz was so little concerned with natural law in his attempted definition of legal science, especially since, as Roscoe Pound said as early as 1911, something very like a resurrection of natural law was going on the world over. Apparently for Kantorowicz, natural law was, as we have said, only one of many elements of the social milieu out of which come "justiciable rules that prescribe external behavior." He adds it to a list which includes state-made law, judge-made law, church-made law, customary law and international law. (p. 13) All kinds of law are grist for the legal scientist's mill. And natural law is to go into the hopper with state-made law, and the rest, as just another kind of law. There is no indication that for most of the legal community "natural law" stands, in some vital way, in antithesis to state-made law; or that to many jurists it presents a profoundly different aspect from that of state-made law. Hence it is that many positivists deny any validity to natural law as "law," whereas most natural law theorists insist upon its paramountcy over the prescriptions of any form of positive human law.

If Kantorowicz had announced his definition of law not as *the* definition of law, but as *his* definition of law, no one would have the right to object. By the standards of modern formal science, one is permitted to select his definitions with an eye to the work they are to do. Formal criteria of defining, such as clarity, consistency, and nonredundancy, go not to the material character of the elements of definitions, but to their logical structure. In the nonformal aspects of definition, selection can be very broad. These aspects set the self-imposed limits of scholarly choice. Therefore, if Kantorowicz had merely asserted the scholar's freedom to limit the domain of his inquiry, it would have been perfectly proper for him to define law as "a body of social rules prescribing external conduct and considered justiciable." Indeed, any serious exercise in analytical jurisprudence, in the light of modern disregard of this important area of the law, would be welcome. But the present book was published as a self-contained though rather abbreviated treatise on the nature of legal defining and it speaks of The Right Method. It also assumes tacitly that the Science of Law covers the whole domain of jurisprudence. These assumptions are worth investigating.

To the reviewer's mind, law is a complex of two main elements — science and morality. Though amalgamated in legal practice, both elements still retain much of their original autonomy, so that an attempt to reduce one to the other leads to intolerable paradoxes. This is the element of truth in the Kantian separation of the legal "is" and "ought," or in the distinction between "fact" and "law." To be sure, a genuine scholarly attempt, such as Kantorowicz could undoubtedly be counted on to make, to reduce the mixed moral and factual elements of law to a science, is always in order. What matter if one is convinced that the attempt is "doomed to failure"? A philosopher, to be any good at all, must ride his horse to death. Therefore, if Kantorowicz had written a History of Legal

Science, one would be forced to judge it on its merits, and the author's introductory abstract definition of law would have paled into insignificance. If, then, one could have had a comparable history written from the point of view that reduced all legal phenomena to the ideal of justice, a balance might have been struck.

Lacking such antagonistic briefs, one is permitted to consider how the History of Law could be written from the point of view that is gradually emerging, namely, that law is a synthesis of science and morality, of positivism and natural law.

The reviewer believes that nothing less than a revolution in the twin methods of science and morality will suffice for this task. In his view law is a combination of minimal morality and outmoded science. It awaits a new order of methodological synthesis in which an expanded conception of science, a more nearly adequate behavioral science, will be able to handle the scientific (factual, actual) aspects of man's moral behavior, and a vigorous, rejuvenated "moral science" which will be able to reach down into the very foundations of natural science to show that every scientific act, however factual it may purport to be, is also a moral decision.

Otherwise put, as scientific methodology turns from measurement theory to theory of decision, the moral quality of every scientific "decision" (even if it is only the reading of an oscillating counter) becomes more apparent. Conversely, every moral decision rests upon an assumption of fact. This much modern pragmatism has done for us. We need scientists willing to confront moral decisions with the inadequacy of the data upon which they are based and moralists skilled enough in scientific methodology to be able to show that a nonmoral scientific choice is a contradiction in terms.

Elsewhere,[2] the reviewer has stated the matter for law in the form of postulates which assert that every legal disposition is a matter of choice and that every instance of choice involves a moral decision. This is an effort in the direction of a philosophical synthesis for the new science and the new morality which law needs in order to raise its fact-finding above the level of outmoded science and its law-giving higher than that of a minimal morality.

THOMAS A. COWAN

2. *A Postulate Set for Experimental Jurisprudence,* 18 PHILOSOPHY OF SCIENCE 1 (1951); *Postulates for Experimental Jurisprudence,* 9 RUTGERS LAW REVIEW 404 (1954).

EARLY ENGLISH LEGAL LITERATURE. Cambridge Studies in English Legal History. By T. F. T. Plucknett. New York: Cambridge University Press, 1958. Pp. viii, 120. $3.75.

In some quarters, it would seem, it is still thought that there must be a choice between jurisprudence and legal history. Some acquaintance with both is surely a necessary part of the training and equipment of an excellent lawyer today,

though any real competence in either seems difficult, if not impossible, to achieve within the already bursting limits of the highly technical law school curriculum of our times. As Plucknett observes, jurisprudence is in effect "the product of a philosopher surveying the law," and surely Maitland's belief that it would give English students "a liberal and liberating influence in their study of English law" (p. 18) was sound for the English context and is sound for the American, and there is no challenge here to Jurisprudentia's importance.

But legal history is not a deadening influence to be opposed to the liberating force of jurisprudence — unless one thinks of history only in terms of the technical treatment of a Reeves. Legal history is also a liberating influence, for it involves comparsion, "and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history." [1]

Legal history further involves intellectual and social life: that Maitland came to his work in legal history from his early Cambridge studies in philosophy and political science is one explanation for the depth and precision of his writing in legal history.[2] There is an enormous difference between the technical work of a Reeves and the full reach of legal history of a Maitland. But to the question of Maitland's achievement and of Plucknett's view of Maitland in Chapter I of the book under review, I shall return after considering Plucknett's five lectures on the beginnings of English legal science, which I propose to take up *seriatim*.

1) *'The Early Literature of English Law.'* * — To examine the genesis and development of English legal literature demands indeed considerable breadth of approach, for no field of learning in the twelfth century can be approached in isolation, and England during this century was too intimately connected with the continent for any part of its intellectual life to be considered in isolation: "the mental atmosphere which could nourish books of systematic scholarship was no more confined to any one science than to any one country." (p. 20)

Plucknett approaches the problem of the first writers of law books in England through the aims and methods of the theologian and the canonist, and he writes cogently. Yet it is, I think, too much of a simplification to concentrate on the arrangement of authorities and omit both the function of the gloss and its importance in developing the apparatus, for the development of the Gloss to the Justinian and the Canon Law (as well as to the Bible) is an essential element in the history of thought from the eleventh through the fourteenth century, in techniques of research as in methods of teaching. For (to turn to a brilliant analytic history of the study of the Bible in the Middle Ages),

> In the middle ages both teaching and original thinking centered in texts which had been handed down from an earlier period, whether it were

* This is the title of Ch. II in Plucknett.

1. F. W. Maitland, *Why the History of English Law is not Written* (1888). Reprinted in 1 COLLECTED PAPERS 480 (ed. by H. A. L. Fisher, 1911). Quoted by PLUCKNETT, *op. cit.* at 11.

2. "He brought to the law a mind exercised in the wide open spaces of philosophy," as Plucknett (p. 14) writes.

> an inspired text, the Bible, or a *corpus iuris*, or a classical author. Hence it was essential for teaching purposes that the text should have some standard exposition accompanying it as a gloss, for use in lectures, which should be accessible to all scholars and students, and which everyone could refer to in the certainty of being understood. We find this development both in biblical study and in Roman and canon law. All three sciences produced a *Glossa ordinaria*.[3]

But part of the task for the twelfth-century English legal writer was to gather and organize the authorities — indeed, to ascertain what the authority was — and only against such a background of both the intellectual currents and the techniques of scholarship can the situation in late eleventh- and early twelfth-century England be understood; and the earliest effort to achieve a real law-book was by the anonymous royalist cleric who wrote a collection of Anglo-Saxon laws later called *Quadripartitus*.[4] (1114-18) One must praise the soundness with which this book of then contemporary law is put into a full and meaningful context. Instead of Stubbs' judgment of the book as "an undigested mass of detail" [5] — an opinion still widely held — we can now see "that the author studied his authorities thoroughly, translating Cnut [and Cnut first as "the most recent and authoritative statement of Anglo-Saxon law"] and the rest of the laws from the difficult Anglo-Saxon into his own brand of Latin in *Quadripartitus I.*" We see too that he searched "for authority into the remote and Continental past," using the outmoded rhetorical organization[6] of Isidore's *Etymologiae* and "such unusual sources as the Salic and Ripuarian laws"; he fared better when he turned to the *Decretum* and *Panormia* of Ivo of Chartres, showing that he chose "the most advanced of his recent contemporaries." Perhaps his greatest achievement,

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3. BERYL SMALLEY, THE STUDY OF THE BIBLE IN THE MIDDLE AGES 52 (2nd ed., Oxford: Blackwell, 1952). I do not pretend to give an adequate summary of her rich contribution to this problem, a contribution which rests upon "the interplay of ideas, institutions and character"; see esp. her Introduction, pp. xi-xxii, and further, my review in 38 CATHOLIC HISTORICAL REVIEW 442 (1953). Although there is a mass of modern scholarship on the glossators, no comprehensive history of the juristic gloss has yet been written; for an introduction one may turn to Hermann Kantorowicz's *Note on the Development of the Gloss to the Justinian and the Canon Law*, in SMALLEY, *op. cit.* at 52-6.

4. The later fortunes of *Quadripartitus* are rather curious, and not, of course, indicated by Plucknett in this survey. Kenneth Sisam's claim that Lambarde's texts of 1 Athelstan and Athelstan's Charitable Ordinance were translations into an Elizabethan Anglo-Saxon from the medieval Latin was contested by F. Liebermann, the great editor of Anglo-Saxon laws, but Sisam seems to have won his case. The laws are printed by Liebermann in *Gesetze der Angelsachsen* (Halle, 1903-1916) and by F. L. Attenborough, *The Laws of the Earliest English Kings* (Cambridge, 1922). For Sisam's argument, see *The Authenticity of Certain Texts in Lambarde's* Archaionomia *1568*, 18 MODERN LANGUAGE REVIEW 98 ff. (1923), and *ibid.*, vol. 20 (1925), reprinted in SISAM, STUDIES IN THE HISTORY OF OLD ENGLISH LITERATURE (Oxford, 1953); Liebermann contested in *Ist Lambardes Text der Gesetze Aethelstans neuzeitliche Fälschung?*, 25 BEIBLATT ZUR ANGLIA (1924). See also my *Early Anglo-Saxon Studies and Legal Scholarship in the Renaissance*, 5 STUDIES IN THE RENAISSANCE 102, 106 (New York, 1958).

5. WILLIAM STUBBS, LECTURES ON EARLY ENGLISH HISTORY 143 (ed. by A. Hassall, London, 1906).

6. The history of the kinship of rhetoric and law is an ancient one, and honorable; I have sketched some aspects of it in England in *Rhetoric and Law in Sixteenth-Century England*, 50 STUDIES IN PHILOLOGY 110 (1953).

in fact, was to have thought that a law-book ought to be written in England, "no small exploit in 1118." (pp. 29-30)

But with Glanvill (1187-9) we are on higher ground:

> we are, for the first time in the history of our law, presented with a law-book, written by a lawyer, framed upon principles derived from the law, and not from those of any other science. (p. 36)

All of this is, perhaps, not strikingly new, though the clarity with which Plucknett perceives and presents the historical context of these works is exemplary, and by virtue of this presentation he illuminates each work. He enables the modern student to see that the achievement of the author of *Quadripartitus* and *Leges Henrici Primi* and of Glanvill parallels the adventures of Englishmen in the great achievements being made in theology and philosophy, and to a lesser degree in canon and civil law. Like Gratian, Glanvill built his book around authorities, "but his authorities were not canons nor decretals nor their English equivalents, but writs." (p. 40) It was indeed a momentous choice which fixed the conviction of subsequent lawyers that writs were the backbone of English law, and it marked a cleavage between English and continental law.

2) *'Bracton and His Work'* and *'Bractonian Problems.'**— For the study of any medieval text today, manuscript study is crucial; no scholar can long remain ignorant of or indifferent to manuscript problems.[7] Hence Plucknett begins his survey of Bracton with an excursus into textual criticism, for upon the brilliant textual work of the late Hermann Kantorowicz rests a still contested interpretation of Bracton as "a consummate Romanist, using Roman terminology with surprising skill, improving upon its definitions, correcting Justinian, seeing points that Mommsen missed, and systematizing better than his master Azo." [8] (p. 53) Yet Bracton's legal career, Kantorowicz believed, was not that of a civilian or a canonist but that of a common lawyer. Working from native writs and plea rolls (and not wanting to romanize English law) Bracton

> deliberately separated the law of things from the law of actions and he took that to mean the separation of substantive law from procedural law. The magnitude of that achievement is the measure of Bracton's contribution to English legal service. . . . (p. 60)

But his book (c. 1259), Plucknett declares, does not split into two parts:

> With sure judgment, he gave us our substantive principles, but his cross-

* These are the titles of Ch. III and IV respectively, in Plucknett.

7. Thus R. W. Southern's recent *Note on the Text of "Glanvill,"* 55 ENGLISH HISTORICAL REVIEW 81 (1950), called into question G. E. Woodbine's edition of 1932 on the grounds that too little attention had been paid to one of the manuscript traditions. This has led to the preparation of a new edition of Glanvill by R. W. Southern and G. D. G. Hall.

8. Maitland, sometimes offered as leader of the opposition to such a view, made it clear in his BRACTON AND AZO, 8 SELDEN SOCIETY 41 ff., that "the text of Bracton presented considerable difficulties which made him cautious in dealing with the question of Bracton's Romanism. The theory of a Redactor would not have come as a surprise to him." PLUCKNETT, *op. cit.* at 56.

> references make it clear that, to him, cases illustrated not only procedural but substantive law as well. His book therefore suffers no dichotomy but is a well-knit whole. The first foreshadows all our textbooks; the second part, all our books of practice. (p. 60)

Bractonian problems, it might be said, begin with the manuscript page; and though Maitland read the manuscripts of Bracton, Kantorowicz endeavored to get to the true text of Bracton concealed beneath the bewildering confusions contained in those manuscripts.

Even the modern reader interested only generally in Bracton should be aware of the special problems for the student of Bracton — he must "decide whether the book he reads is by the master, or by his bungling thirteenth-century editor" (p. 66) — and first perhaps among these problems is that of the *addiciones,* passages written at a later date than the main text and then incorporated into the text. After presenting most objectively the openness of the question, Plucknett offers a most appealing modification of Kantorowicz's theory of a Redactor of Bracton: the Redactor was Bracton's clerk or secretary, who travelled constantly about the country with the immensely hard-working Bracton. Written intermittently and continually interrupted, the book was "merely the roughest preliminary draft"; "in all essentials it was merely a working draft," however, and the author himself "continued to make *addiciones* to it," and copies got into circulation before it was finished — even before the important chapter on dower was written. Hence these working drafts "became the archetype of all the surviving manuscripts, with all the resulting complications which have worried editors from the sixteenth century until today." [9] (pp. 72-73)

Enormous, and costly, as it was, Bracton's book was deeply studied, annotated and commented upon, and widely copied in the next two generations. (p. 77) Some portions were separated and incorporated with other tracts; manuscripts show attempts both to shorten the work and to bring it up to date. The two tracts known as Hengham *Magna* and Hengham *Parva* — works of 50 and 20 pages, respectively, apparently students' books of the last third of the thirteenth century and both very popular — are examples of such efforts. Plucknett's survey of these, and of *Fleta,* Thornton's *Summa de Legibus,* and 'Britton,' is necessarily brief, yet it is readable and offers a sharply focused perspective.[10]

Clearly, 'Britton' is the end of an age. The "massive, learned cosmopolitan Bracton" has been abridged, excerpted and vulgarized: "it is the end of a tradition which runs from *Quadripartitus* and the *Leges Henrici Primi* through Glanvill to Bracton — a tradition rooted in general scientific method as applied

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9. Plucknett is not here concerned with political theories in Bracton. There has been increasing interest in Bracton among historians of political thought, especially in the notion of 'Bracton on Kingship' and the "seemingly self-contradictory concept of a kingship at once above and below the law": a brilliant contribution was made by C. H. McIlwain in Constitutionalism: Ancient and Modern 67 ff. (2nd ed., Ithaca, N. Y., 1947), clarifying apparent contradictions; for a magisterial discussion, together with relevant scholarship, see E. H. Kantorowicz, The King's Two Bodies 143 ff. (Princeton, 1957), and my forthcoming review in The Review of Politics (1959).

10. One must add Dr. Kantorowicz's recent paper on *The Prologue to* Fleta *and the School of Petrus de Vinea,* 32 Speculum 231 (1957), which establishes some important connections.

by the Middle Ages to all the major fields of study, a tradition in all its essentials academic." (pp. 60, 79)

3) *'Fresh Beginnings.'* * — Among other things the thirteenth century witnessed a growing preference for French over Latin: Britton alone of the epitomes of Bracton had been in French, now Glanvill is finally put into French and brought up to date. (p. 81) Towards the end of Edward II's reign the statutes, at first in Latin, generally become French. French treatises on law begin after 1260, reports of cases in law in the 1270's, and the French translation of Glanvill dates from 1265: the change of language clearly marks a revolution, one already under way during the last years of Bracton's own lifetime,[11] and that revolution has important implications. First, these changes suggest that there is a new class of lettered laymen who, though they may understand Latin, are fluent only in French; and second, judges and serjeants are becoming lay, and rapidly so, during the reign of Edward I, "and that implies that for a generation there had been in training a body of lay lawyers." (p. 82)

The investigation of the non-Bractonian literature of the later thirteenth century is, as Plucknett remarks, a difficult but fascinating task, for some of the examples in print have been edited only summarily, and many manuscripts in the university and Inns of Court libraries are not adequately catalogued or easily identified. *Brevia Placitata* — one of the earliest (c. 1260) and one of the most significant of this type of legal literature — has recently been well edited by G. J. Turner, and of this important 'formula book' Plucknett writes:

> The breadth and depth of Bracton's thought about law is utterly rejected by this unknown writer who took up his pen at the moment when Bracton abandoned his. If Bracton was Latin, Roman and clerical, this author was French, insular and lay. Where Bracton strove to emulate the contemporary Italian masters, this man gave us the primitive, indeed, the archaic, in legal literature. I have entitled this lecture 'Fresh Beginnings' and in truth *Brevia Placitata* takes us back to the antique when it gives us forms, and nothing but forms. (p. 84)

Others followed. Plucknett singles out the much-neglected *Fet Asaver,* and avers that the shortcomings of Woodbine's edition of 1910 — unsound text, faulty punctuation, etc., — have been responsible for the failure to recognize the quality of *Fet Asaver.* And he emphasizes the achievement of "our new legal profession": "Bracton's great merit is to have shown for the first time that English law *ought* to be studied analytically; the merit of *Fet Asaver* is to have shown for the first time how it could be *done* in purely native terms." (pp. 95-96)

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* This is the title of Ch. V in Plucknett.

11. Maitland's pioneering study of Year-Book French is still classic: Introduction to YEAR BOOK 1 & 2 EDWARD II, 1307-9 xxxiii ff. 17 SELDEN SOCIETY (1903). This famous essay was reprinted, in part, in *Cambridge History of English Literature* I, ch. 20. For a summary discussion of the whole subject of the language of the Year Books, see POLLOCK AND MAITLAND, 1 HISTORY OF ENGLISH LAW 80 ff. (1952 reprint of 2nd ed. 1898). I have endeavored to bring that account up to date and to make some adjustments in the light of present scholarship in a forthcoming paper, *Law-French,* KENTUCKY FOREIGN LANGUAGE QUARTERLY (1959).

4) *'Cases and Year Books.'* * — Plucknett begins with a stimulating paralleling of the law of Normandy with the English; few commentators and historians have been competent to make a comparative survey of this phase and aspect of English common law. Certain features and circumstances in English law-reporting — the tendency to cast the report into dialogue form, the indifference to the decision, and the prominence of the serjeants — lead to the conclusion that "our English reporters are not primarily looking for 'authority,' still less for substantive law. . . . Their great preoccupation, I believe, was pleading and procedure." [12] Plucknett's views on the origin of the Year Books are challenging and fruitful, as is his discussion of the reasons behind the printing of the Year Books and of the role of the practicing lawyer-teachers. Tough the law certainly was, Plucknett writes in his final paragraph (which looks forward to a badly-neglected field of legal study, the early Tudor, and which will turn us back to Plucknett's introductory essay on Maitland):

> and Maitland divined the secret when he pointed to the teachers as the explanation. Professor Thorne's work has already thrown much new light upon the Inns of Court, their Readers, their moots, and their readings. It was these picked men whose oral lectures replaced the written book, reminding us of the archaic times when literature was handed on by the spoken word before the use of writing. [What is paradoxical is that these Readings should have flowered after the introduction of printing into England.] By the end of the century they get written down, and there are clear signs that the Readers, if no one else, had been looking at the Year Books. They were indeed a slender thread, but it held. It was the Year Books, in this most obscure epoch, which maintained the continuity of English law. There was indeed the sun of Bracton and the moon of Littleton to illuminate the scene each in his season, but for most of the time English lawyers walked by the light of faint anonymous stars. Of science there was very little (and I have been at some pains to lament it rather loudly). Nevertheless, English law plodded on, with its eyes stubbornly turned away from the glittering pages of the Digest to pursue its own course — insular, lay, and French (what French!). Altogether an odd story, which may well arouse our interest; indeed, it fascinated Maitland. (p. 114)

5) *'Maitland's View of Law and History.'* * — This volume of lectures is clearly an introductory survey, one which takes the law student back to the beginnings of legal writing in England. That it is so lively and entertaining a story is in the best tradition of Maitland's style; that it offers the highest excellence of English legal scholarship — locating the early writings in their intellectual milieu and sketching the important interactions between English law and

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* This is the title of Ch. VI in Plucknett.

* This is the title of Plucknett's concluding chapter.

12. "The whole business of pleading orally, in face of the court and with opponents ready to pounce at any moment, was an immensely skilful and recondite game, conducted with great virtuosity by the leaders of the bar, and keenly relished by all others who were sufficiently learned to understand what it was all about. After such a display, it was an anti-climax to think of a decision. . . ." PLUCKNETT, *op. cit.* at 103. See also the author's *Rhetoric and Law in Sixteenth-Century England, loc. cit. supra,* note 6 at 117-18.

the Roman and canon laws, as well as certain related disciplines — is perhaps the ultimate tribute to the achievement of Maitland. For it was under Maitland's guidance that the history of law in England was transformed from a sterile, technical, and obscure study, one which had no relationship to historical methods in other fields, into a great discipline and a great intellectual adventure.

In Chapter I (reprinted from the *Law Quarterly Review*), Plucknett gives a splendid notion of Maitland's enormous range, and superbly enables us to catch a glimpse of the man. In one important aspect of his discussion he refutes the legend of Vinogradoff's influence, the story that Maitland "first learned from the lips of a foreigner the matchless riches of the Public Record Office": for (as Plucknett clearly establishes) Maitland had been working on plea rolls well before his "decisive meeting" with Vinogradoff. But perhaps best of all is Plucknett's elucidation of Maitland's curiously disconcerting inaugural lecture as Downing Professor on "Why the history of English law is not written" (1888) and his clear establishment of the fact that Maitland's later career "must be read as the gradual abandonment of the propositions laid down in 1888." And at the end "Maitland had so enlarged the bounds of legal history that the separatism of his inaugural had completely vanished. He had finally established the fact that legal history is not law, but history, and that all history is one." (p. 16) Thus, detesting the insularity of nineteenth-century law (as did Holmes, at Harvard Law School after the Civil War), "he joined forces with Brunner, Stubbs, Holmes, Thayer, Ames, Vinogradoff, Viollet, Liebermann, Gierke, and how many others, in maintaining that English legal history can only be studied in comparison with that of other systems: 'history involves comparison'. . ." (p. 17) But Maitland's mission was dual: first to separate legal history from law, and second "to make certain that history should not be 'the handmaid of dogma.'"

All aspects of Maitland's coupling of jurisprudence with legal history have not been explored by Plucknett in his introductory essay (though some others have borne good fruit in the studies that follow). Much of the best of Maitland's work is a constant bringing of legal history to bear on problems of jurisprudence, a steady illumination of problems of legal history by a philosophic mind surveying the law — we may cite his brilliant pages on the metaphysics of corporate personality: witness the justly celebrated studies on 'The Crown as Corporation' and 'The Corporation Sole.'[13] With Maitland in mind, then, one might indeed adapt Bosanquet's famous dictum on aesthetics and declare that jurisprudential thinking has always been most vital when most historical; but that is a contention which goes beyond the limits of our present consideration.

R. J. SCHOECK

13. SELECTED ESSAYS 104-26, and *id.* at 73-103 (Cambridge, 1936).

LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT. By Michel Villey. Paris: Dalloz, 1957. Pp. 442. Fs. 1975.

The work of Michel Villey comprises three sections. The first is a short and brilliant sketch of the history of legal philosophy from antiquity to the present. (pp. 11-120) The second, which presents a dozen detailed studies of particular topics, reveals the background of long and scholarly research which the author brings to the vast panorama presented in the first section. The short final section need not detain us as it is devoted to general reflections on history.

One notes that M. Villey writes as a historian, and that it is through the study of history that he approaches the philosophy of law. He maintains that "the science of law is a historical discipline." By this he means that a juridical system is a long time building and hence is not truly intelligible unless one has traced through the centuries the formation of its operative principles and concepts. But legal history is not simply a conglomeration of learned studies of the rules governing dowry in the thirteenth century or the forms of testamentary dispositions in the time of the Twelve Tables. Nor is it simply a general description of the institutions of public and private law. Even the reconstruction of the juridical systems as they worked out in actual practice at different periods of time does not exhaust its scope. "The key to legal history is the history of philosophy." It is the philosophers, the great philosophers, who have laid down the dominant themes of legal development, the guiding principles which give to each legal system its unique quality. To be sure, legislators and jurists are not in the habit of consulting metaphysicians, but they move in a culture which is continually being leavened with metaphysical speculations. Some of them, moreover, read a certain amount of philosophy. These introduce into the law new ideas which enrich the common doctrine for a long time thereafter.

Thus when Villey speaks of the philosophy of law, what he has in mind is not primarily the kind of "metajuridical" reflections which philosophically minded jurists pursue, using their art and science as a starting point — the kind of work that is done by a Dabin in Belgium, a Roubier or a Batiffol in France, a Del Vecchio in Italy, a Coing or a Fechner in Germany. His primary concern is with general philosophy, the domain of such men as Plato, Aristotle, St. Thomas, Kant, and Hegel, or with political and social philosophy where such names as Hobbes, Locke, Rosseau, Comte, and Marx are added to those of Plato and Aristotle. These great thinkers have had their influence in every intellectual sphere, that of law not excepted.

Villey takes great pains in tracing the ways in which various streams came to meet in the different legal systems which confront the historian (and one might add, the student of comparative law).

In Roman law he observes the impact of Greek philosophy, with its idea of Greek justice — a justice expressed in terms of equality (arithmetical or geometrical) and, hence, an objective justice which presupposes the existence of an order or harmony in nature, and which forms the basis for distinguishing morality from law.

This influence seems to him stronger and more lasting than that of Christian

thought. To be sure, in an early period (from Constantine to the thirteenth century) there was established "a law of religious origin comparable in this regard to the modern Moslem law." With the advent of St. Thomas the renewal of Aristotelian thought based on the natural order of things set in motion a progressive secularization of the law — which, incidentally, becomes in this way more faithful to the spirit of the Gospel.

Since the Renaissance, modern thought has transformed profoundly the conception of natural law. No longer are we to understand by it an objective law, a relation subsisting among things and imposed upon us from without. We must see it rather as a law of personal rights ("subjective law"), a manifestation of a primal liberty which is to be safeguarded either through the institutions of society or despite them, these institutions being in either event of purely human origin. Here we see coming to light various basic lines of approach which still figure largely in the thinking of modern jurists. Among these are the doctrine of positivism ("so called because it recognizes as true law only the positive law emanating from the legislative will"), and especially the concept of personal rights, with its subsidiary notions of legal capacity, law of persons, and law of things, and the related theories of property and contract.

It is this idea of personal rights that furnishes the theme for three of the most interesting of the topical studies in this volume. In opposition to a widely held opinion, Villey maintains that the Romans never developed any real conception of subjective law, their *jura* and even their *proprietas* being primarily concerned with the ordering of society. This is no accident. The foremost task set by the Greek philosophy which formed their inspiration was that of establishing for each thing its particular place in the universal order.

It is from another philosophy that we get our first clear analyses of personal rights. This is the philosophy which at the end of the Middle Ages gives an indication of what is to come, the philosophy of men like Duns Scotus and Occam, who, long before Hobbes and Gassendi, ridiculed "the world of quiddities, essences and final causes" envisioned in Scholastic philosophy. These men no longer believed in the immutable order which had been supposed to govern the world; in the social order which confronted them they could see no more than the arbitrary dispositions of human judgment. Where, then, were they to find the basis of a natural law if not in the "free and separate individuals" who alone were immune to the work of destructive criticism? Thus Occam, the first it seems, came to analyze law powerfully and clearly as "a liberty, a power, a *potestas.*"

We have digressed somewhat in order to afford an insight into the contribution the author makes with his own researches. It remains for us to conclude our review of the general schema of history which he puts before us.

This brings us to the nineteenth century with its cult of science and its new patterns of juridical thought such as economism, historicism, sociologism. These various scientifically oriented "isms" seem already dated. While they have broadened our perspectives, they have also to a certain extent sapped the foundations of law by a precipitous transition from "is" to "ought."

In analyzing the movements of the twentieth century, Villey practices the reserve of the historian who knows that he is not at a sufficient remove from his

subject. His diffidence is our loss. We would have liked to learn what his own position is. But in presenting the various currents of present-day juridical thinking, he does no more than give us the impression that his preferences lie in the direction of phenomenological studies and existentialist thought.

Personally, we would gladly join him in these preferences. Doubtless, however, we would do so in a spirit rather different from his. Making the philosophy of law the object of a purely historical study as he does, one runs the risk of subjecting to a principle of relativism a field which should concern itself above all with uncovering the bedrock of absolute truth. To be sure, it is vital to any kind of legal learning to understand the ties linking the major philosophical and religious choices open to man with the legal systems to be found in various times and places. But it is not enough to set forth and explain these systems. Above all, we must see what lies at the root of all of them, however they have grown up — their common purpose of ordering human relations. It is at this point that the idea of a natural order with binding force suggests itself readily to the mind. But Villey is too much the historian to put much faith in the modern attempts to restore the doctrine of natural law. "We must relinquish the hope of finding in 'nature' immutable, concrete, consistent principles of law. What we describe as nature, human nature, the nature of things, is most often no more than a product of civilization, the effect of human choice within a historical context." (p. 99)

We ourselves are well aware that the old term "nature" is, for many, a pitfall. Villey, indeed, may perhaps be counted among its victims; for he does not conceal his sympathy for the works of Coing and Fechner, works in which it is not difficult to recognize, in rejuvenated form, the familiar features of the traditional natural law.

RENÉ THÉRY

(Translated by JEANNE RODES)

CORRIGENDA

[Because of a misunderstanding on the part of the staff of the NATURAL LAW FORUM, certain of the editorial changes made in Professor Arnold Brecht's review of Erik Wolf's *Das Problem der Naturrechtslehre, Versuch einer Orientierung,* 3 NATURAL LAW FORUM 192 (1958), have distorted the original meaning Professor Brecht wished to convey. We are happy to publish the following corrections prepared by Professor Brecht.—Ed.]

Professor Wolf, at the end of his book, enumerates four approaches to the problem of natural law: the ontological, the ethical, the logical, and the metaphysical. My review called attention to the fact that Wolf explicitly declares all four, including the metaphysical approach, to be necessary in order to establish and justify natural law. In its edited version, the review then goes on to say that this view of Wolf's "enhances greatly the importance of the theory of natural law." But what I had actually written was rather the opposite, namely, that Wolf's statement was "an admission of the greatest importance for the theory of natural law," not that it enhanced the importance of that theory. The point I wanted to make was that Wolf's admission implied a rejection of the secular theory that moral laws can be derived from nature irrespective of whether or not divine forces are operative within nature. The importance of this rejection for the natural law controversy should be clear. If the theory of a moral natural law presupposes divine forces, then its acceptance depends logically on the previous or simultaneous acceptance of divinity. It is then illogical to teach that the existence of a moral natural law can be scientifically verified but that the existence of divine forces cannot, although it is not illogical — even in the absence of scientific verification — to *believe* in both divine will and its expression in a moral law of nature. This corresponds to my own views in this matter.

Second, in the context of scientific verifiability I distinguished between knowledge that is intersubjectively "transmissible *qua* knowledge," and knowledge, real or putative, that is not so transmissible. The term "transmissible" has been editorially changed to "communicable." This is in conflict with my well-considered use of terms. There is no doubt that metaphysical knowledge is "communicable" in the sense of "relatable"; but it is doubtful and controversial whether such knowledge, real or putative, is scientifically "transmissible *qua* knowledge." Having introduced this distinction of terms in several of my former articles and elaborated on it in my book *Political Theory — The Foundations of Twentieth-Century Political Thought,* a full-length review of natural law doctrines just published by Princeton University Press (603 pp.), I wish to prevent confusion in stating here that the term used in my review of Wolf's book was "transmissible," and not "communicable."

Finally, I did not write "We must postulate some 'basic norm,'" as it was printed (p. 197), but I wrote that Kelsen had said so. My own opinions deviate from Kelsen's in this point, as explained more thoroughly in the aforementioned book.

ARNOLD BRECHT